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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BILL 6, BUSINESS CORPORATIONS ACT

TUESDAY, JANUARY 5, 1982

Morning Sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Treleaven, R. L. (Oxford PC)
Andrewes, P. W. (Lincoln PC)
Breithaupt, J. R. (Kitchener L)
Eaton, R. G. (Middlesex PC)
Elston, M. J. (Huron-Bruce L)
Gordon, J. K. (Sudbury PC)
Laughren, F. (Nickel Belt NDP)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Piché, R. L. (Cochrane North PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M (Yorkview L)

Substitutions:

Hennessey, M (Fort William PC) for Mr. Andrewes
Kells, M. (Humber PC) for Mr. MacQuarrie
Kolyn, A (Lakeshore PC) for Mr. Piche
Runciman, R. W. (Leeds PC) for Mr. Gordon

Clerk: Forsyth, S.

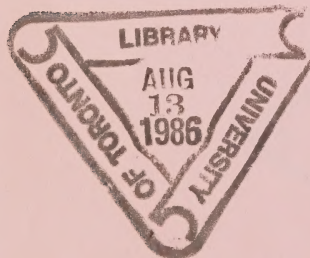
From the Ministry of the Attorney General:
Yurkow, R., Legislative Counsel

From the Ministry of Consumer and Commercial Relations:
Howard, B. C., Executive Director, Companies Division
Mitchell, R. C., Parliamentary Assistant

Witnesses:

From the Canadian Bar Association (Ontario Branch):
Coombs, M., Messrs. Osler, Hoskin, Harcourt
Hebb, L., Chairman, Committee on Bill 6
Levitt, B., Secretary, Committee on Bill 6

From the Institute of Chartered Accountants of Ontario:
Dalglish, K., President
Knight, D., Chairman, Corporation and Securities Law Committee
LaFlair, P., Director of Professional Services



LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Tuesday, January 5, 1982

The committee met at 10:06 a.m. in committee room No. 1.

BUSINESS CORPORATIONS ACT

Mr. Chairman: Gentlemen, we have a quorum. There are many substitutions today. We are dealing with Bill 6, An Act to revise the Business Corporations Act, referred to this committee by the House on December 18.

Mr. Breithaupt: Since this bill is new to many members of the committee, and there are many new members on the committee, I wonder if there would be an opportunity to have the content of the bill briefly reviewed so that any major changes or reorganization within the bill would be apparent to the members of the committee.

A number of us have been through the Business Corporations Act on several occasions, but it is now being entirely rewritten and I think it would be useful to spend a few moments giving an overview and then showing us the particular areas on which we are likely to receive questions or comments from the various groups that are to appear before us. This will then give us a chance to zero in on the particular themes that are important and be aware of the major themes being changed within the bill. So that if we take a few moments to do that, it might set the scene and make our work a lot more reasonable.

Mr. Chairman: Mr. Breithaupt, who do you propose to lead the choir on the areas where we are likely to have attention?

Mr. Breithaupt: I see that we have a statement that Mr. Mitchell is going to read to us. Perhaps he is going to be the acting choir director for now.

Mr. Hennessy: That will be the highlight.

Mr. Mitchell: Mr. Chairman, if I may, I do have an opening statement. After that statement, then perhaps the executive director of the companies division, Mr. Benson Howard, and the director of the company law division would make a few comments if there are other areas of concern that you might have.

Mr. Breithaupt: I think something like that would be useful, Mr. Chairman.

Mr. Renwick: Mr. Chairman, my colleague Floyd Laughren is stranded in Sudbury.

Mr. Chairman: With Mr. Gordon.

10:10 a.m.

Mr. Renwick: He will not be with us this morning. I

assume he will be with us either some time later today or tomorrow morning.

I would like to be a little more formal on the question than my colleague, Mr. Breithaupt. I would like the parliamentary assistant and Mr. Howard and his other advisers to understand that from my point of view I am relying on them to advise me of each and every significant change--not material change, significant change--in the bill, which is a much wider ambit, not only during our discussions but when we come to clause by clause consideration of the bill.

There are many changes in this bill which we in this committee are responsible for in reporting to the assembly. If we are going to make it simply a formal operation, then I do not want to be associated with it. I want to understand what the changes are and I want every member of the committee to understand what the changes are. I want as much assistance as possible. I know it will be forthcoming, but I wanted to say that.

The other matter--and as we will not be reaching the clause by clause discussion until probably tomorrow afternoon sometime--would it be possible and does it make sense for the ministry to provide the members with a table of concordance between the existing Business Corporations Act as it appears in the revised statutes and this new bill, to the extent that is possible?

Mr. Howard: Mr. Renwick, we haven't undertaken that task in the office and to do so now would impose quite a burden on the staff.

Mr. Renwick: What you are saying is--

Mr. Howard: We have no concordance.

Mr. Renwick: I take it that what you are saying is that the bill is a major restatement of the business corporations law of the province.

Mr. Howard: That is right. The explanatory notes are very helpful and give a great deal of detail--

Mr. Renwick: I know they are helpful and I withdraw my request for a table of concordance, not because the work would be onerous because I am quite certain that is not my problem, but because it would not be of practical assistance to us. I take that to be what you are telling me.

Mr. Howard: I don't see it would be of any assistance at this time. For the clause by clause review, there are footnote references, as has been counsel's practice, to the existing RSO.

Mr. Renwick: I want to reiterate I will be relying on the staff of the ministry in this particular specialized field to comment on each section of the bill that has any changes and to explain to us what the changes are so we will understand it and the record of this committee's proceedings will be clear about it.

Mr. Mitchell: Mr. Renwick, we will accept that as being the modus operandi here. In fact, I myself will have to rely to a great degree on the assistance of Mr. Howard and Mr. Wells through this whole very large bill which has a number of amendments we will be introducing. I think it is fair to say what you are looking for will be provided during our deliberations.

Mr. Chairman: Mr. Mitchell, would you carry on with your opening statement please?

Mr. Mitchell: I have already introduced Mr. Benson Howard and Ted Wells. Before we begin our clause by clause review of Bill 6 I would like to reflect for a moment on the history this draft legislation has had.

The act to revise the Business Corporations Act has had the benefit of input and direction from noted individuals and interested groups and I understand the previous minister publicly thanked them in the House for their assistance.

In addition, the draft bill was circulated twice over the past two years to the financial, business and legal communities for comment and their valuable suggestions formed the basis of many of the changes in the legislation before us today. There is no doubt in my mind that the breadth of participation in its development has made our task here just a little bit easier.

Because of the proposed changes in the federal legislation to give effect to the national energy program, we have made further amendments to Bill 6 at this late date so that Ontario corporations in the energy resources field may participate in the national energy program.

I will move these and other amendments in committee to bring Ontario legislation in line as far as possible with federal legislation, that is, the Canada Business Corporations Act, and the acts in other provinces.

In addition to increased consistency with federal legislation, some of the other changes arise from the recommendations of the select committee on company law in its 1967 and 1973 reports. I am led to believe, Mr. Renwick, you may have been a member of that committee as well at one time.

Mr. Renwick: I don't recall. It's so long ago.

Mr. Mitchell: Of course, we saw a need to further protect the rights of minority shareholders. Bill 6 addresses those requirements and I am confident that the financial and legal community in Ontario will welcome the revised act. We are, for example, preparing amendments with respect to director's liability for employees wages in line with Mr. Renwick's suggestion during debate on second reading of the bill.

This committee will be dealing with these and other Bill 6 provisions in detail so I need not review the other provisions at this time. However, I would like to spend a few moments on the amendments to the bill which we feel must be made as a result of

the federal government's national energy program, the proposed Securities Act amendments, and the report of the joint industry committee on public ownership in the Canadian securities industry.

In its report, the committee recommended, and I quote, "That no firm may permit a public trading market to develop in its shares or debt convertible into shares unless it is a constrained share corporation under the CBCA--the Canada Business Corporations Act--or a provincial corporation with at least equally effective provisions."

Until now, Bill 6 has not provided for constrained share corporations, although restrictions on the transfer of shares were authorized. The Securities Act does not allow corporate registrants to go public unless the articles provide restrictions on issue, transfer, and ownership of shares, in order to limit the percentage of voting shares an outside investor may hold.

The amended Bill 6 will respond to the committee report and the Securities Act with a new section 42, which empowers a corporation to provide in its articles restriction on the ownership, transfer, or issue of its shares. I would like to add that we have discussed this change with legal and financial people in the private and public sectors before making the changes.

The second and very compelling reason for amending section 42 is the federal national energy program, in which three goals of the federal government are stated: At least 50 per cent Canadian ownership of oil and gas production by 1990; Canadian control of a significant number of the larger oil and gas firms; and an early increase in the share of the oil and gas sector owned by the government of Canada. The program also states that the government intends to encourage, and I quote, "private Canadian firms to acquire some of the foreign-controlled oil and gas companies, and Canadians to enter this sector either through acquisitions or new exploration."

The intent of the federal program is clear as is the petroleum incentive program designed to help Canadian owned and controlled firms. We do not wish to impede Ontario corporations or to create road blocks or obstacles for them. We therefore feel that the amended section 42 will enable Ontario corporations to participate under the NEP and to qualify for the benefits of the program with regard to the exploration and development of energy resources.

The new section 42 then provides that restrictions on issue transfer and ownership of shares must be authorized by the articles of the corporation. In addition, if it is a publicly traded company, those restrictions must be necessary for compliance with Ontario or federal law to attain or maintain a level of Canadian ownership.

I am confident that the members of this committee will agree with me that Bill 6 and its amendments will go a long way towards providing a more efficient and effective atmosphere for business in Ontario.

Mr. Chairman: Does anyone from the Liberal Party wish to comment?

Mr. Breithaupt: Mr. Chairman, I would like to make just a few comments. One is with respect to the fact that yes, Mr. Renwick was a member of the company law committee when it was first formed and looked at this statute back in 1965. It is amazing how those years have gone by and how other tasks given to the company law committee over the years were accomplished, but now we are in a situation where it is probably time to review that bill again. It would be nice if that committee could be given that task, but I suppose it has completed the duties which were given to it.

10:20 a.m.

One thing I would suggest at this time, Mr. Chairman, is that the clerk be asked to create for us the usual chart we have had on detailed bills such as this. That chart with the page reference would contain the various sections as they may be spoken to by those who are appearing before us so that we would be in a position, once we are in a clause-by-clause discussion, to have a ready reference as to just who may have spoken to what particular point and whether they thought it was good, bad or indifferent. If that could be accomplished, although we do not have the number of briefs that we have had in that past, it would still be a useful exercise and of help to the members of the committee.

Mr. Renwick: Mr. Chairman, I suppose my comment is simply the obvious one, that while it may be easier in one sense, it is much more difficult for the committee to handle the bill when it has been through immense internal and private discussions with the ministry over a long period of time. There will be many of the clauses which have been altered as a result of those discussions, but we will never be privy to the reasons or the discussions that led to those various changes.

That is why I interjected at the beginning about the dependence which we will have on you, sir, and your advisers about each and every clause in the bill. I am certain that as a result of the private discussions which have been held some of the changes were positive ones. I am also equally concerned that a number of them may have served the special interests of those who are close to the government in business matters, and that is always of significant concern to me.

I would like to make a second point, which is a digression from the Business Corporations Act. My colleague Mr. Breithaupt is the chairman of the select committee on company law, which is about to expire after many years. The one area which has never been dealt with and which was part of the original mandate of that committee is the question of corporations without share capital. It is a very serious default in the corporation law of this province that those corporations, of which there are now an immense range across Ontario of all kinds and of all sizes and dimensions, are operating under an archaic law without adequate provisions for the protection of those who are involved with them or in them. It is, in my view, a disgrace that this province has not got an up-to-date law with respect to corporations without share capital.

I am not begging. My preference would be that it would be done by way of the select committee on company law, but my preference and the preference of the government are not usually identical. Therefore, I am simply saying to the ministry, as I have said on other occasions, that must be given a top priority in the ministry, or all of the work of the select committee will have been done that it was assigned to do except for that one field. That one field was in its original mandate and has not been discharged.

Mr. Mitchell: Mr. Renwick. I am going to have Mr. Howard respond to the particular concern you have just raised.

Mr. Howard: Mr. Chairman, Mr. Renwick, at the top of our list of things to be done is a not-for-profit corporations act. Mr. Wells, as the director of the company law branch, has been assigned that task. Once we get clear of this, which has been going on since I took over companies in 1975, we can do that, but we cannot do everything. We have only limited legal resources now in this constraint period and we take these things in order of priority.

The first is the Business Corporations Act and we also have a business names act going before the minister and it will go into the House very shortly, hopefully. We also have the repeal of the Mortmain and Charitable Uses Act, which I think was introduced just before the House rose. We also have a new extraprovincial corporations act in the offing. We have not just been twiddling our thumbs over there, but we cannot do everything at once.

Mr. Renwick: I can understand the constraints under which you are operating. I think Mr. Breithaupt would concur that he would be glad to offer the services of his committee to deal with the question of corporations without share capital, or his successor would at any time after the middle of February of this year.

Mr. Eaton: I think we have heard a great case for the continuation of the company law committee.

Mr. Breithaupt: Not necessarily, Mr. Eaton. There is one thing I would reinforce and that is the fact that over the years we had dealt with all the areas on that committee to which we had been given instruction with the once exception of corporations without share capital. One thinks of hospital boards, golf clubs and a variety of other organizations that are operating with very little responsibility to the public, the shareholders, the payers of fees or whoever might be in those circumstances.

It is clearly an area where the law in Ontario is badly out of date. I am very pleased to hear from Mr. Howard that there will be not only the opportunity to deal with that area, but also the other three which he mentioned, once the House returns in March. I would think a review of those particular areas will certainly make Ontario's corporate law as current and up to date in all its aspects as we are always led to believe by the government that it now is.

We have an opportunity to clear up that area and I am very pleased to hear that is under way. Whatever committee happens to

get that responsibility will be doing a good thing if it is able to bring to a head the concerns a variety of people have in that area of corporations without share capital or, as Mr. Howard has referred to them, the not-for-profit corporations. I think that will be a real step forward and I look forward to seeing that legislation when it is introduced in the House.

Mr. Renwick: There are two other very brief comments I would like to make. I look forward to the amendment to section 130. I would be anxious to have it as soon as possible so we can look at it. I assume we will be getting this morning the other amendments referred to, particularly the amendment to the new section 42 that the parliamentary assistant has just spoken to.

Mr. Howard: May I interrupt for a moment? The representatives who are here from the bar will be addressing these matters at the NEP in particular. I see no reason why those proposed amendments, if we have them, could not be given to the members. That would be the amendment to section 42 and the amendment to section 130.

With respect to the amendment to section 42, which is key to assisting the energy resource corporations, there will be consequential amendments in the bill beginning at section 5 and going right through to regulatory powers at the end. But section 42 is the key.

Mr. Renwick: I can well understand that, but if we have the essential amendments, then we can deal with the consequential ones in committee.

Mr. Howard: These gentlemen from the bar have been working with Canada on the amendments and they are simply following what Canada proposes to do. They are the ones who are most knowledgeable in this area.

Mr. Breithaupt: Could we have those amendments then, Mr. Chairman, so we will be able to follow with somewhat greater usefulness the proposals that are going to be made to us on behalf of the Canadian Bar Association?

Mr. Chairman: Mr. Breithaupt, check with the ministry as to whether it wishes to release them all at this point or bit by bit.

Mr. Breithaupt: Usually when a committee is reviewing a bill and going into clause by clause description it is given the amendments that are being proposed. Whether they are actually proposed or withdrawn or not dealt with, of course, is entirely at the discretion of the ministry; we have no control over that.

10:30 a.m.

Mr. Chairman: Correct. We would obviously have them for clause by clause, but in this case it is a question of whether we have them in front of us when the various presentations are made so that time is not spent on a clause that is already heading for

amendment. I think we are going to distribute right now all amendments of the ministry at this point.

Mr. Mitchell: It will take a few moments. We will have to have them photocopied. We had planned to present them as we began clause by clause, but if it is the committee's wish, we can have them provided. The clerk has them in his possession and will arrange that they be provided.

Mr. Breithaupt: They may be a useful reference. However, we can get on with the other and have them whenever they are ready.

Mr. Chairman: Mr. Renwick, were you finished?

Mr. Renwick: Yes. I assume we shall recess from 12:30 to two o'clock.

Mr. Chairman: That is correct.

May we then have the first group, the Ontario branch of the Canadian Bar Association, whether there are two or three of you, Messrs. Hebb and Levitt, and Mr. Coombs may wish to come with you. Are the three of you together?

Interjection: Yes.

Mr. Chairman: Yes, thank you. Along that end of the table, if you would. Is there one spokesman or three spokesmen?

Interjection: Three spokesmen.

Interjection: Five or six, depending on how you phrase the question.

Mr. Chairman: Would you please identify yourselves from east to west or north to south?

Mr. Levitt: My name is Brian Levitt.

Mr. Hebb: Larry Hebb.

Mr. Coombs: Maurice Coombs.

Mr. Hebb: We are all with the firm of Osler, Hoskin and Harcourt. I am appearing as chairman of the Canadian Bar Association committee that has been looking at Bill 6 and the predecessors of Bill 6.

My partner Brian Levitt has served as secretary of that committee and he is appearing in that capacity. My partner Maurice Coombs has been roped into this to speak to you in connection with the NEP amendments. My firm, Osler, Hoskin and Harcourt, has been retained by the federal government to advise it on the drafting of amendments to the Canada Business Corporations Act, designed to facilitate the imposition of constraints for NEP purposes, and through that connection we were able to assist the Ontario officials in adapting the federal provisions for insertion in the new Ontario bill.

The proposal is that I and Brian Levitt would talk about the provisions of Bill 6 other than the NEP provisions, and then I would ask Maurice Coombs if he would take you through the NEP provisions.

In this regard, I think it would be extremely helpful if the members of the committee could have in front of them copies of the provisions. I would hope that the photocopy process could be done sufficiently expeditiously that that would be possible so that he could make reference to particular sections.

Mr. Breithaupt: Is there a written contribution that you have?

Mr. Hebb: No. My presentation is an oral one.

Let me begin by saying that I appreciate the invitation to appear before the standing committee to explain the role of the bar association in the development of Bill 6. I should like to express the appreciation of the bar association for the opportunity to comment on various drafts of the bill before it was given first reading in the Legislature and as it has progressed through the legislative process to date.

We feel it is important that representatives of the legal community review at an early stage your legislation and the significance of Bill 6. I am chairman of a volunteer committee of 15 members of the business law section of the bar association's Ontario branch. The members of the committee are specialists in corporation law practising in Toronto. The committee includes one academic.

I should like to very quickly mention the names of the committee members so you have some idea of where they come from. In addition to my partner Brian Levitt, who served as secretary of the committee, the committee includes Frank Iacobucci, dean of the faculty of law at the University of Toronto; Peter Jewett of Tory, Tory, Deslauriers and Binnington; Alex Langford of the Miller, Thomson, Sedgewick, Lewis and Healy firm; John Langs of Fraser and Beatty; Jon Levin of Faskin and Calvin; Donald Mattheson of Miller, Thomson, Sedgewick, Lewis and Healy; Rick McIvor of Blake, Cassels and Graydon; Richard Shaw, Black and Associates of Calgary, formerly with McCarthy and McCarthy of Toronto; Jim Spence of Tory, Tory, DesLauriers and Binnington; Lorie Waisberg of Goodman and Goodman; John Warren of Borden and Elliot; Martin Wasserman of Goodman and Carr; and Brian Westlake of Blake, Cassels and Graydon.

The members of our committee have given advice on the bill in its various stages of development on an informal basis. By that I mean that our recommendations to the ministry have never been approved by the Canadian Bar Association in any formal sense, so our advice has been really the advice of the group of hopefully representative practitioners who were put together to give advice on this informal basis to the ministry. It does not represent a formal position of the bar association.

Brian Levitt and myself and other members of the committee will endeavour to be in attendance throughout your hearings this

week in case that will be helpful in connection with questions you may have about the bill in view of our "association" with the drafting of it. This committee was formed for the sole purpose of considering and advising on this bill. Up to this time our advice has been given solely to the officials of the ministry charged with preparation of the bill.

Our advice has been mostly on technical legal matters and this is a very important point that I would like to make. Generally speaking, the committee did not get involved in policy matters of major significance from a business point of view as opposed to a legal point of view. Our objective was to make the bill workable from a technical legal point and so we generally did not take a position on major policy matters, except where policy position appeared to us to be problematic from a technical perspective.

Our committee's involvement with the bill began in April 1979. The initial draft of the bill was prepared by officials of the companies division of the ministry and the committee was given that draft for review in the spring of 1979. We met on a weekly basis from April to June in 1979. In June we submitted a report of over 200 pages to the ministry in which not only were specific changes to the ministry's draft suggested, but we drafted the changes that we wanted.

The draft bill was extremely revised as a result of our report. It is fair to say that the ministry found our approach of actually drafting the recommended changes to be extremely helpful, and from our point of view, although this was a lot of work, I think this approach enhanced the likelihood of our recommendations being adopted by the ministry.

I think it is an approach that I would recommend to some of the other people who submitted briefs. I read through several of the written briefs that are going to be presented to you. The discipline of trying to actually draft the recommended changes is often very valuable in terms of working through the ideas and producing a more refined recommendation.

The bill was first given broad public circulation in December 1979 as a draft bill. It was again published in exposure draft in June 1980. In December 1980 the bill was given first reading in the Legislature. In April 1981 again it was given first reading. Our committee advised the ministry on the changes made in each of these four versions of the bill. Similarly we have advised the ministry on the amendments to Bill 6 that you will be receiving in a few minutes.

After submitting our report to the ministry in June 1979 on the initial draft of the bill, we advised the ministry more informally on the next four versions by meetings, telephone conversations and correspondence, and we continued to draft changes in the bill that seemed appropriate. A particularly intensive time for our committee was during the first half of 1980 when a smaller group of members of the committee met on a weekly basis to review the whole bill again.

Let me make some general comments on the new act. The new

act, as you know, would replace completely the existing Business Corporations Act, which became law a little more than 10 years ago. Although the existing act is considered an advanced statute, both in terms of shareholders' rights and in terms of management flexibility, it is the view of many who work with the existing act that it has been surpassed, at least from the perspective of shareholders' rights, by the Canada Business Corporations Act, which was passed by the federal Parliament in 1975. The new act may be seen as an effort by Ontario to catch up to the federal Corporations Law.

As the Canada Business Corporations Act--

Mr. Renwick: The 1975 federal act was an attempt to catch up with Ontario.

Mr. Hebb: Or overtake. As the Canada Business Corporations Act is the principal inspiration for the new act in Ontario, the bill reproduces verbatim, to a considerable degree, provisions of the federal statute. However, in a number of areas, the new act follows the language or concepts of the existing Ontario act, or modifies in minor respects the language or concepts of the federal act. The government's objective in developing the new act appears to have been to give Ontario better corporations law through combining what were considered to be the best provisions of the federal act and of the existing Ontario act.

10:40 a.m.

As I said before, although our committee did not generally get involved in policy matters of major significance, there is one broad policy area I should mention where our committee did take a strong position. We expressed very strong support for a move towards uniformity in Canadian corporate law represented by the bill, in that it follows in many respects the federal Canada Business Corporations Act.

Many of the changes we suggested to the ministry were designed to achieve greater uniformity between Ontario and federal corporations law. As a general rule we pressed Ontario to adopt the federal provisions, except where we had identified technical deficiencies in the federal legislation, or where we believed that the existing Ontario provisions were, for some reason, conceptually superior to the corresponding federal provisions, either from the point of view of shareholders' rights or management flexibility. One instance of that technical point is that we encouraged Ontario to retain its theory involving the conversion of shares which we considered as a superior approach to the federal theory. In that instance we moved away from the general approach of uniformity.

We had considerable success in persuading the ministry officials to follow federal law. I guess though it is fair to say we would like to see even more by way of uniformity in the bill than was the ultimate result.

I said at the beginning that the bar association appreciates the opportunity to participate in the development of the bill. We think it is vital that the government commit itself to making

amendments to the new act on a regular basis, that is every year or two, so the new act stays up to date and significant reforms do not have to wait for a brand new corporations law in another decade or so.

In this regard our committee has had discussions with ministry officials regarding the establishment of a standing committee of the Canadian Bar Association that would have the mandate of making recommendations once a year to the minister as to appropriate amendments to the act. This proposal has been accepted informally by the ministry officials and we would hope to get this implemented following the advent of the new act.

I would now like to turn to partner Brian Levitt and ask him if he would discuss some of the principal areas in which the new act adopts provisions of the Canada Business Corporations Act and also a few of the areas in which the new act continues to follow provisions of the present Ontario law which differ from those of the present federal law. I think to some degree this will respond to Mr. Renwick's concern about picking up the significant changes between the two acts.

Maybe before we go on to Brian Levitt, are there any questions anyone wants to ask me or do you want to wait until the three of us are finished?

Mr. Chairman: Yes, I think so. In fact various members of the committee may want to briefly interject to get clarification from time to time.

Mr. Levitt: I would certainly welcome that. I would propose to deal with three areas of the bill more by way of example because it would take quite a bit of time to go through the whole bill in this detail.

But just to give the members of the committee a sense of the approach that has been taken with the bill where the CBCA, the Canada Business Corporations Act, has been followed and the nature of the minor amendments that have been incorporated. We could of course go through the whole bill, but that would take quite some time. I thought the areas I might touch on would be the areas of corporate finance, since there has been quite a bit of discussion about that in briefs, the areas of shareholders' rights, which are always of interest, and the transition provisions; that is, the provisions for the superseding by the new act of the old act and what its implications will be.

I would propose to refer to section numbers. If the discussion becomes too detailed, please stop me.

In the corporate finance area I think the approach that has been taken in the bill is to substantially adopt the corporate finance provisions of the Canada Business Corporations Act. These provisions are found generally in the sections of the act following, in part III, section 22 and following, and particularly the key sections relating to the types of shares that corporations can have, all being in registered form and without par value, and the manner in which shares are to be issued and the consideration

for which they can be issued is covered by section 23. Bill 6 follows, almost word for word, the CBCA.

Some variations that the committee might wish to note are, for example, subsection 23(4), which continues the practice which was found in the existing Ontario Business Corporations Act in subsection 42(5) of that act, of requiring that where shares are issued for a consideration other than cash the directors make a determination as to the value or the minimum value of the property.

The CBCA, while permitting shares to be issued either for cash or noncash consideration, does not expressly require the directors to make a determination as to what the cash equivalent value of the consideration is where the consideration is not in the form of cash.

Subsection 42(5) of the existing Ontario act did contain such a requirement and that requirement has been carried through on the basis that it is a helpful requirement, certainly for practitioners who have to give opinions as to whether the act has been complied with, because it helps to demonstrate that the requirement of the act that where shares are issued for noncash consideration that consideration have a cash equivalent value which is at least equal to the cash the corporation would have received if the shares had been issued for cash, has been complied with.

Another minor but important variation from the CBCA is found in subsection 24(7). Under the CBCA it is possible, by resolution of shareholders, to cause amounts to be moved in the accounts of the corporation from the surplus accounts to the share capital accounts, the so-called stated capital accounts. The effect of making that movement under the tax law is that the shareholders get a deemed dividend, the holders of the shares to whose stated capital account the amounts have been added get a deemed dividend and it is a taxable event for them.

Under the CBCA it is possible for holders of voting shares to cause amounts to be added to the stated capital of nonvoting shares; thereby you would have one class, in effect, voting a deemed dividend to another class, causing a taxable event for the holders of the other class of shares. So, subsection 24(7) of the bill provides that where it is proposed that an amount be added to the stated capital of a class of shares, any class that is specially affected vote separately. So in the example I gave, the shareholders of the class to which the amount was being added would have a separate class vote and therefore be able to vote for or against it, as the group most affected by it.

Mr. Breithaupt: In that instance, would the simple majority of shareholders in that class be sufficient to deny the addition of that amount?

Mr. Levitt: No, it would have to be a two-thirds majority because it is a fundamental change. It is a fundamental change under section--

Mr. Breithaupt: To reject that addition, if such were the case, or to--

Mr. Levitt: That is right. It would take two thirds to accept it.

Mr. Breithaupt: Yes.

Mr. Levitt: So, in effect--

Mr. Breithaupt: The presumption being that it would likely be something that would be acceptable.

10:50 a.m.

Mr. Levitt: That is right, but if it was unacceptable to the holders of 34 per cent of the shares of the class that was especially affected, it couldn't be carried out, no matter who else was voting in favour of it.

Mr. Breithaupt: Fine, thank you.

Mr. Levitt: Another corporation finance provision that has received some attention is the financial assistance provision found in section 20 of the new act. This is a provision which permits the corporation in certain circumstances to give financial assistance for the acquisition of its own shares. The provision found in the bill here with some very minor modifications reflects section 42 of the Canada Business Corporations Act provision.

An example of the sort of minor changes that have been made is found if you look at section 20. The general principle enunciated by section 20 is that a corporation may give financial assistance to shareholders, directors and officers for any purpose and to any person for the purpose of acquiring its shares where, after giving such assistance, the corporation would still be solvent. So that this is basically a rule for the protection of creditors.

There are certain exceptions to that rule found in 20(2), that is situations in which the corporation can give this type of assistance. They include, for example, financial assistance given by a parent company to guarantee a subsidiary's obligations, guarantees by wholly-owned subsidiaries to their parent corporations and assistance to enable employees to erect or acquire a dwelling for their own occupation or to purchase shares of the corporation.

In the CBCA, the exception for the purchase of shares, subsection 2(e)(ii) requires that for a plan to be eligible for that exception the shares have to be purchased by a trustee for the benefit of the employees. I think it has been found in practice that is just an impediment. It inhibits the flexibility of the plan.

Mr. Breithaupt: With respect to the financial assistance matter, is the giving of the guarantee itself deemed to be financial assistance when it is given or only if it is called upon?

Mr. Levitt: No, it is when it is given on the theory that without it--it is when it is given, I would say.

Mr. Breithaupt: It is presumed to have some value in the fact of being given, whether it is called upon or not?

Mr. Levitt: That is right.

Mr. Breithaupt: I guess there is very little way otherwise to police the whole thing in a practical way.

Mr. Levitt: Precisely, because it is too late when it is called on. If you couldn't determine whether it could be given until it was to be called on, the person who accepted the guarantee would never know what its value was until he had to call on it and then he might find at that point it was determined it couldn't be given and therefore was not valid. In order for the guarantee to serve its usual purpose, which is to induce somebody to make a loan, that person making the loan has to know from the outset that if he ever has to call on it, he will be able to call on it. To answer your question, the validity is established at the time it is given and that is when they have to meet the test.

Mr. Chairman: Section 20(2)(e)(ii) right at the very end, "to purchase shares in corporations both issued and unissued" is referring to both of those, am I correct?

Mr. Levitt: Yes, it is issued and unissued.

Mr. Breithaupt: Whatever the plan may be?

Mr. Levitt: Whatever the plan may be.

Mr. Breithaupt: Including the commitment they would be issued later?

Mr. Levitt: Yes, it would include that. That was all I proposed to deal with in the corporate finance area. If there are any questions, I could respond to them.

Mr. Spensieri: If I wish to block the giving of a guarantee by a corporation, is my only cause for blocking it contravention of this section, or would I have other--

Mr. Levitt: No, if it is contrary to what could be described as generally accepted practices, you could take advantage of the oppression remedy. That is a new shareholder's right.

Mr. Spensieri: That is in addition to.

Mr. Levitt: That is right. This is simply a constitutional section. It defines the powers of the corporation to do or when it can do certain things, but it is overridden by all of the remedies, or can be overridden by all the remedies that are in the back of the act.

Mr. Spensieri: That would otherwise be available.

Mr. Levitt: That are otherwise available. That are generally available. For example, we might just follow this up

because it is a good example of the oppression remedy which is a new addition to this act. It is section 246 of the bill.

Let us take the example that has been posed. We could imagine a case in which the directors were going to grant themselves loans to purchase new shares to be issued by the company because somebody was making an offer and they were trying to fend it off by issuing more shares and they were going to use the company's assets. Let us just assume that they could meet the section 20 test--I suspect they could not in that situation but let us assume they could--a shareholder who felt that was not right could make an application to the court under section 246(2) and he would allege that the business or affairs, say 246(2)(b) the business or affairs of the corporation are being, or are threatened to be carried on in a manner that is oppressive or unfairly prejudicial to the interests of a security holder, which would be another shareholder.

So that there is the addition of the words, "or are threatened." The oppression remedy is a lift from the CBCA, and the CBCA provision is derived from a provision of the United Kingdom Companies Act. There have been some modifications made to the oppression remedy and I think the addition of the words "or are threatened" would give you the right to go to court and pre-empt the issue or the making of that loan or the issue, because you would say that "I found out that this was going to happen, and I want an injunction to stop them."

You will notice that under section 246(3) the court has very broad powers. There is a list of a whole number of things the court can do and they are all without limitation.

Mr. Breithaupt: It is interesting looking at the first subparagraph of section 246, just since we happen to be there. My reading of that would be that all three would have to apply to the court. Why would that not say a complainant, the director, or, in the case of an offering corporation, the commission may apply? It seems a major stroke for liberty if we are able to change an and to an or, but--

Mr. Levitt: I think actually you are making a point.

Mr. Breithaupt: Our work may not be in vain.

Mr. Levitt: I think if you changed the and to an or, the result will be that in the case of an offering corporation it would be arguable that the complainant could not apply.

Mr. Breithaupt: Perhaps it is a fine point for legislative counsel. Maybe we should tag that--246(1). It is a point that just may be looked at later.

Mr. Howard: This was done deliberately. It may be a complainant of a nonoffering or nonpublic corporation, and the director would act on his behalf. If it is a public corporation the commission would apply to the court. The director and the complainant would apply in one case, the complainant and the commission would be applying in another case, or the commission

alone, or the director alone. I think that is the sense that we tried to make out of it.

11 a.m.

Mr. Breithaupt: That does not make sense to me.

Mr. Howard: We deliberately did not want it disjunctive.

Mr. Breithaupt: But having it conjunctive that way, to me it means that all three are involved in order to apply.

Mr. Howard: They could well be, but it would not necessarily be.

Interjection: I would interpret that as being permissive, that all three may apply or any one of them may apply. It looks to me that it is meaning that all three must apply if any one applies.

Mr. Breithaupt: It sure does, but we will comment on that later. It is something to think about.

Mr. Chairman: May I then, when that is being brought up with the "and/or," since we are jumping all over the place, look at section 98(1). There is an "and" there, and again I am like Mr. Breithaupt. I would have thought it would have meant "and/or," and perhaps since this is ringing bells with me, can we clarify this distinction between the "and" and the "or" at this point because it is in more than one place obviously.

Mr. Howard: Section 98?

Mr. Chairman: Yes, the "and" at the end of 98(1)(a).

Mr. Levitt: I think in this case the "and" is correct because if it said "or," the shareholder would arguably be in the position of having to elect either to submit the proposal or to attend the meeting and talk about it there.

Mr. Chairman: However, if you use the word "and," the implication in (b) is he would have been entitled to submit. That implies that he did not submit a proposal.

Mr. Hebb: It is precisely because of this sort of discussion that people have invented "and/or." This is the perfect case for "and/or," so as to avoid either of those interpretations. These are alternatives and, at the same time, they can be used together.

Mr. Chairman: I am lost. There is an implication in (b) that he has not made a proposal and (a) is that he did make a proposal, so you have them hooked up by an "and" which says you make a proposal and then the implication you do not. Will somebody give an explanation or clarification for me on that?

Mr. Mitchell: Mr. Chairman, it may be that you are seeking some response from the representatives that are appearing before the committee, but we can deal with that when we deal with

clause by clause. I have asked Mr. Howard to make particular notes of these points that are being raised.

Mr. Breithaupt: That is exactly the kind of thing that we have to be precise about, of course, as to what is wanted when there are choices, whether both must be attended to, or whether one has priority over the other, or whether either can be done without the other, and it is a most difficult thing to draft.

Mr. Chairman: From a simplistic sort of country solicitor point of view, there is the simple "and/or," which is pretty basic. I am a little at a loss here as to the "and/or," and I wonder if there is a philosophy we can clear up at the beginning which will clarify the whole procedure. Should we leave it for clause by clause?

Mr. Breithaupt: It is going to be very difficult to do.

Mr. Chairman: Mr. Howard suggests clause by clause, and maybe we will defer to him. Thank you. Sorry for jumping in there.

Mr. Renwick, you had a point.

Mr. Renwick: I do not care when we take it up, but I have a question about section 20.

Mr. Chairman: I have certainly interrupted the line of thought.

Mr. Hebb: I was just going to comment that, for what it is worth, this is an exact lift from the Canada Business Corporations Act. If there is a clarity problem, that is in the present Canada Business Corporations Act. It does not mean we should not fix it here, but that is the origin of this particular judgement about "and" versus "or," so we have to be considering that situation as to why this section as it is phrased is with us for the continuity and similarity requirements which may be more important than an actual interpretation that we might presume to give.

In fairness, when the CBCA first came out, it had many clauses which were less than perfect therein and, therefore, I am not sure that by simply following that blindly is going to lead us anywhere but to a blind alley. Correct? We do not want to follow it necessarily as the--

Mr. Hebb: No, I agree. As I said before, I am sure the legislative counsel has specific rules on this very point and they will tell you immediately that this is the way they always handle this sort of situation or this is the way they do not, that it is not the way to do it.

Mr. Renwick: Before I comment on section 20, I am a little bit concerned about where we are going, not with the presentation which is perfectly in order with me, but it does seem to me that if we are going to be--and I guess I come back to my attempt to get some clarification about what we are doing--is it conceivable that we could get copies of the Canada act for each

member of the committee? Is it possible that we can get pamphlet copies--if there is one--of the present Business Corporations Act?

The latest one I have is 1978. It seems to me that if we are going to be constantly directed to sections which are copies of federal sections, we should have the Canada Business Corporations Act available to us. I certainly think that we should have copies of the existing Business Corporations Act available to us, rather than to find it in the revised statutes or to photostat it.

Mr. Chairman: We will try to have them here at two o'clock.

Mr. Renwick: I just think it would be helpful to us. I am concerned--perhaps you would consider this, and I hope Mr. Howard and his advisers and Mr. Wells would also consider it--I am confused about section 20 in the, I believe, clarity of the drafting of it. Let me put the bald statement and then tell me if I am incorrect in my understanding.

Why should a corporation be able to give financial assistance by way of a loan to an employee to enable that employee to purchase or erect living accommodation for his or her accommodation, if there are reasonable grounds for believing the corporation is, after giving the financial assistance, would be unable to pay its liabilities as they become due?

To put it another way, you will note at the beginning of subsection (1) it says, "Except as permitted under subsection (2), a corporation...shall not give financial assistance by a means of a loan"--to any employee--"where there are reasonable grounds for believing that, (c) the corporation is or, after giving the financial assistance, would be unable to pay its liabilities as they become due," and then you accept, as one of the exceptions, the provision of a loan to enable the person to buy a house, even though that would result in making the corporation unable to pay its liabilities.

Let me just make the point. I have only selected one instance of the exception. It could be applied to each of the others, but I thought perhaps that would express it as clearly as I could. Am I wrong in that interpretation of what this says?

Mr. Levitt: Your interpretation is quite correct that the exceptions are forms of financial assistance which can be granted without regard to the solvency test.

Mr. Breithaupt: Therefore, priority pledge of the assistance--

Mr. Levitt: Let me--

Mr. Renwick: My recollection of the history of this section is obviously faulty, at this point, but as I understood it, the solvency test was not originally a part of this section. There was a specific prohibition against giving financial assistance and then there were certain exceptions. There was an overall, general

statement that a company cannot do anything which would have the effect of making it insolvent.

The introduction of the solvency test into the prohibition has led to considerable confusion in this section because the solvency test obviously should apply to any loan or any financial assistance. That would be my view. Then, provided it did not make it insolvent, there would be specific areas in which financial assistance could be given, namely, those which are listed and that would be the exhaustive list. I only raise it because I think there is something wrong with it.

11:10 a.m.

Mr. Levitt: I would be quite happy to respond to it, if it is in order, not in an argumentative sense but in an explanatory sense. The existing act in section 16, which is the existing Ontario act, which I think will be 15, if this is the 1980 revised, either 15 or 17 in the old Revised Statutes of Ontario, is in the form that you recollect it. There is a blanket prohibition with certain exceptions.

The exceptions are without regard to a solvency test so that I think in effect this does not represent a change, because under the old act if a corporation were to have devoted a substantial or, indeed, all its assets to one of the permitted forms of financial assistance, that would have been a transaction that did not contravene the section so long as it did not contravene it in any other way.

Mr. Renwick: I do not disagree. I just think the introduction into this section of the solvency test has led to anomalous results because I have no problems with the exceptions, but I do not think any of the exceptions should be permitted if, as a result of exercising any of the powers given by way of exception, the result will be to make the company insolvent. I think I am pointing to a drafting problem rather than an argument of substance about it.

Mr. Levitt: Except that you could take the case of the housing loan as one, but look at (d), financial assistance to a subsidiary. It is quite a common corporation structure to have a holding company and then a number of operating companies. You might have all the assets of the holding company pledged to support guarantees of the indebtedness of the operating company. I would have thought, without getting into policy, that should not be an offensive--

Mr. Renwick: All I am saying is it appears to me there is a problem when you introduce the solvency test into this section. I agree that it should be introduced--and I noticed Mr. Hebb shook his head--and I used the obviously extreme example, but I think it applies in each of the exceptions if the action taken renders the corporation insolvent, then it does not appear to me that the action should be taken.

Mr. Hebb: What I shook my head about was your assumption that this was a drafting problem. It is not a drafting problem; it

is entirely a policy question. This section has been taken virtually verbatim from the comparable provision of the Canada Business Corporations Act, which in turn stemmed from the recommendations of the Dickerson report which led to the Canada Business Corporations Act. That report recommended as a policy matter that this sort of latitude be permitted, even in the case of insolvent companies.

All I am suggesting to you is simply that it should be addressed solely on a policy basis. This is a very deliberate exception which was thought to be justifiable in insolvency situations.

Mr. Levitt: To follow that up, one of the reasons that it was thought to be justifiable was that the Dickerson report also recommended the introduction of the oppression remedy which is available to creditors.

Mr. Renwick: Which is not a great deal of help if the money is gone. Perhaps if there is a reference back to a Dickerson report which led to the Canada Business Corporations Act and now we are adopting it, we should have that specific decision or recommendation of the Dickerson report.

If it is a policy question, and when I raised it I did not think for a moment it was a policy question. If it is a policy decision that these kinds of financial assistance will be permitted even where they render the corporation to be insolvent, then it seems to me that we have to look at it closely. So I would ask that we get that particular recommendation of the Dickerson report so that, when we come to the clause by clause portion of the bill, we can deal with this question.

I emphasize again that my comment was not thought to be a policy one. It was thought to be the anomalous situation of a company lending money to its employees to buy homes at the point when the act of lending the money would make the company unable to meet its liabilities as they currently become due. I think it applies to some, at least, of the other exceptions. Whether it applies to all of them I am not so certain.

It seems to me that, for example, subsection 2, item (a), is in a different category to item (e). I have a sense that the intercorporate relationships, that is, subsidiary bodies and holding bodies, would require some analysis. I am not certain about item (b) of subsection 2. It seems to me that that is a pretty risky operation, if, as a result of making that financial assistance available, the corporation would then become insolvent.

There are many implications to it and I think it has to be looked at. If it is a policy question, well, let us deal with the policy question. If it is, as I thought it was, a drafting problem consequent upon the introduction of the solvency test, then let us deal with it that way. But we can defer it until we get to it in the clause by clause.

Mr. Chairman: Mr. Coombs had a comment and then perhaps Mr. Howard.

Mr. Coombs: Just to follow up on what Mr. Renwick was saying, you do have to bear in mind that some of those issues that you are raising, Mr. Renwick, would be dealt with by the applicable bankruptcy laws as well, and the rights the creditors have under the federal legislation in that regard and provincial (inaudible) legislation and so on. It is a much broader issue than just--

Mr. Renwick: I understand that. I just think it is anomalous that we should be passing, or considering passing, a section with this change in it which allows the kind of results I am speaking about. I am not suggesting for a moment that a creditor or any other person would not have the normal rights in the event of a bankruptcy.

Mr. Levitt: Indeed he would also have the rights--

Mr. Renwick: It is difficult to get the money back in many cases.

Mr. Levitt: He would have rights under the oppression remedy though in addition, because the oppression remedy specifically authorizes a court to set aside transactions if they are oppressive.

Mr. Renwick: I understand that, that there are remedies. I am suggesting that it may not make sense to permit the activity in the first place.

Mr. Howard: Briefly, the policy decision that was taken was to be uniform with the Canada Business Corporations Act, and here we are following exactly what they have in their act and they have had five or six years' experience with this. It is not only Ontario that is following this. I think you will find if you look at the new Alberta act, it is repeated word for word there too.

Now, I appreciate your point--

Mr. Renwick: There have been many occasions, Mr. Howard, if I may with great respect, where you can repeat an error time and time again. It does not give it any sanction of validity. There is no point in this committee sitting to consider the bill if every time we raise a question that needs an answer, we are told that the decision has been made that it is to be uniform.

Mr. Breithaupt and I with our military experience know that one has to lock-step occasionally, but not all the time. And you do not have to walk over the cliff together just because some junior subaltern has drafted an order which has been incorrectly interpreted. I think we have to get that clear at the beginning. If the policy decision is that this is going to be uniform, fine. I do not want, however, my position associated with stupidity, and I think it is stupid.

I did not want to make the question that firmly, but for a company to lend 10 of its employees each \$100,000 by way of loan to buy a house when the net effect of lending that \$1 million will be to make the corporation insolvent, I do not care whether it is in

the Koran or the Bible, I want to know why that result would follow; and this, in my reading, is what this permits.

11:20 a.m.

Mr. Howard: All I am suggesting, Mr. Renwick, is that a policy decision was made at the time. In this committee, it may be that a new policy decision will have to be made.

Mr. Renwick: I am delighted to hear that and I know Mr. Eaton enjoys that.

Mr. Mitchell: Mr. Renwick, if I might just jump in here at this particular point: I recognize the concerns you are raising with respect to section 20 and Mr. Howard and Mr. Wells will perhaps review it and be able to respond more fully to that when we get into clause by clause. We shall take that as a task.

Mr. Levitt: It's getting a bit past time here. Shall we continue?

Mr. Chairman: You carry on, if you will, please.

Mr. Levitt: We are going to start with a brief overview of shareholders' rights under the new act, again just with a view to seeing the areas in which, while following the CBCA, minor amendments had been made to preserve Ontario practice or to improve upon the CBCA.

We have already dealt with the oppression remedy. I think another important shareholders' right is the derivative action. This is the right for a shareholder to bring an action, not in his own name, but in the name of the corporation and it is generally necessary where those who control the corporation are carrying on its affairs in a way that is unfair to the corporation as opposed to any particular shareholder. But because the wrongdoers are in control of the corporation, the prejudiced shareholder can cause the corporation to commence the necessary legal proceedings.

The existing OBCA has provision for a derivative action in section 97, which was introduced in the 1970 revision of the OBCA, and it did not have a very happy experience in the courts, since it was quite narrowly construed. So a revised form of derivative action, that is section 244 of the bill, has been adopted, and it is closely patterned on section 232 of the CBCA.

Mr. Renwick: What was that section?

Mr. Levitt: Section 244 of the bill, and section 232 of the CBCA is the companion provision.

In the area of calling meetings, the existing act contains a provision whereby shareholders can requisition the holding of a meeting to take some action required to be taken by shareholders, for example, to amend the articles. This is again a situation where those who control the corporation refuse to do it; and since shareholders' meetings are generally called by directors, there was a provision in the existing act and there is a provision in the

CBCA and in the bill, which permits shareholders to requisition meetings. The relevant sections are 104 in the bill, 137 in the CBCA, and 99 in the OBCA.

The important difference I want to draw to your attention is in the question of reimbursement for expenses. Calling a meeting of shareholders of a public company can be a very expensive undertaking, depending on the size of the company; the cost of complying with proxies, solicitation requirements, hiring of halls, legal advice, printing of circulars and all the rest of it, that can run to tens of thousands of dollars.

The existing OBCA provides that the shareholder who called the meeting had his expenses paid by the corporation unless the shareholders at the meeting he had called voted against it. Of course, this was not very helpful where the majority shareholders refused to call the meeting in the first place, because they made it known to anybody who was going to call a meeting using this provision that shareholders would certainly vote against reimbursing him. So it was not very helpful to a majority shareholder in certain instances.

The CBCA has a similar provision, but in the bill, section 104 provides that the person requisitioning the meeting shall be reimbursed unless he is acting in bad faith. So the bill has provided an additional protection to a shareholder seeking to use this mechanism to call the meeting by putting it beyond the power of the majority shareholders to deny him the right to have his expenses reimbursed by the corporation. It is simply an objective question as to whether he is acting in bad faith.

Another area where the bill has substantially broadened shareholders' rights is that of appraisal rights. Section 98 of the existing Ontario act provides limited appraisal rights, that is, the right of a shareholder to require the corporation to purchase his shares because of some fundamental change that has taken place in the nature of the corporation's affairs. The existing act in section 98 restricts that right to private corporations in only two or three circumstances.

The theory behind restricting that right to private corporations was, if you were shareholder of a public corporation and you were unhappy about what was being done and there was a market for your shares and you could sell, the market value was thought to be the fair market value. When the CBCA introduced its appraisal rights, which are found in section 184, they were made applicable both to private and public companies and also the range of circumstances in which they were available to shareholders was substantially broadened. The new act, in section 183, provides appraisal rights for shareholders of both private and public companies in substantially the same situations as the CBCA provides them.

In the area of investigations, the existing act in section 177 contains an investigation provision. The bill in section 159 has adopted substantially the same form of investigation provision as the CBCA, the major difference being that, under the CBCA, the director who is the chief administrative official can commence an

investigation or apply for the commencement of an investigation, whereas under the bill the director would not have that role.

In the area of compulsory acquisitions, the bill contains in section 186 a provision substantially the same as section 199 of the CBCA, which provides that where an offer is made for the shares of a corporation and more than 90 per cent of the shares for which the offer is made or tendered in acceptance of the offer, the offeror has the right to acquire compulsorily the remaining 10 per cent. This is a provision that United Kingdom companies have had for a long time and a number of the American jurisdictions.

11:30 a.m.

Based on the experience with section 199 of the CBCA, some minor amendments were made to section 186 of the OBCA, for example, in the area of making provision for application to a court to require the offeror who is affecting the compulsory acquisition to put up security for the compulsory acquisition price. The CBCA does not provide for that. There is no compulsory acquisition provision in the existing OBCA, no comparable provision.

There is a brand new provision in the bill that is not found in the CBCA. It is unique to the bill, and it is found in section 187, and is the mirror image of the compulsory acquisition right I just spoke about. That is a situation in which somebody has acquired 90 per cent of the shares of the corporation, but does not choose to make the offer for the remaining 10 per cent.

Any of the remaining 10-per-cent holders can cause the corporation to purchase their shares. Whereas, under the CBCA, a person who acquires 90 per cent of the shares simply has the option to acquire the remaining 10 per cent--he does not have to--under the bill, that person not only has the option but can be required to buy by those who want to sell.

A circumstance in which that might become useful is quite often when takeover bids are made. If they are made during the winter sometimes people are out of the country, or can't get their certificates out of the vault, or whatever, and they miss out on the original offer, or maybe they miss out on the follow-up offer, so this would provide them with an additional measure of security.

A procedural shareholder right that has been inserted in the bill is found in section 168. It is modelled on section 170 of the CBCA, which provides that in the circumstances enumerated--and they are all fundamental changes of various kinds, amendments to the articles, what have you--separately affected classes have the right to vote separately. It is possible under the existing act to create shares that are nonvoting in any circumstances, except for the liquidation of the company, and those shares, if they are expressed to be nonvoting in the articles, simply cannot vote no matter what is being done, other than changes to their own terms.

For example, if you had a--

Mr. Breithaupt: On default of preference payments or something.

Mr. Levitt: Yes. But if you have a share structure where there are two or three classes of shares, say class A, class B, class C, and A are senior to B, B senior to C, and the C were nonvoting in any circumstances, you could change the rights of the As under the existing act without the Cs having a say in it. Under the bill, there is specific provision, if you look at section 168(1)(d), for the Cs to have a separate class vote if you are making a change to the As that in some way particularly affects the Cs. These voting rights are purely procedural and, therefore, can be thought to be pretty mundane. They are the basic protection a shareholder has, and this whole question of nonvoting securities has raised quite a bit of interest lately. Hearings have been held on it.

Mr. Breithaupt: So a disadvantage cannot be forced on those shareholders without at least their concurrence.

Mr. Levitt: As a class.

Mr. Breithaupt: Even if voting rights are not otherwise available to them.

Mr. Levitt: That's right. And these provisions, with limited exceptions stated in section 168, are provisions that cannot be contracted out of. In other words, even if the articles say the shares are nonvoting--

Mr. Breithaupt: Most appropriate.

Mr. Levitt: I just thought I would make the point that even if the articles say the shares are nonvoting, they can still vote, with the exception of three circumstances, subsections (a), (b), and (e), where it is possible for the articles to provide that in those limited circumstances they would not vote. In other words, the shareholders can contract out of, can consent to giving up; they can give up the voting right in three of the I think it is eight or nine different circumstances that are enumerated there.

Mr. Breithaupt: But not in circumstances over which they would have no expectation of ever occurring, which would be perhaps a complete change of their rights or some subrogation of them to advantages given to other share--

Mr. Levitt: No, I don't think that's--

Mr. Breithaupt: It seems quite appropriate that that be done.

Mr. Hebb: They would have to be aware when they bought the shares, or should have been aware when they bought the shares, of the fact if they had effectively contracted out of these particular rights, they would include--

Mr. Breithaupt: In some instances.

Mr. Hebb: --in some instances, they would include I guess, Brian, creating a prior ranking or pari passu ranking class of shares, exchange reclassification or cancellation and increasing

or decreasing any numbers of superior classes of shares.

I think the most significant point would be agreeing that a prior ranking class could be created ahead of your own class. This, again, follows the Canada Business Corporations Act and you could argue the policy but the main concern here was uniformity with the federal approach.

Mr. Breithaupt: But that ultimate protection I think is certainly a satisfactory resolution of what might otherwise be a most unfair circumstance.

Mr. Levitt: I think it is also important to point out, as one of the members of the committee pointed out earlier, that having exhausted all your procedural remedies under this act, you still have the oppression remedy and the derivative action remedy which operate independently of the voting. There is a section in here--if I can just put my finger on it--that says that in an action brought either as a derivative action or as an oppression remedy, the court might want to take the fact that the shareholders have approved the action as being a bargain, so that having exhausted your procedural remedies you always have resort to the oppression remedies and the derivative actions.

I think we are through the main areas. The next area I would like to mention briefly is the question of transition, because when you bring in a whole new statute like this there is always a worry in people's minds about what they are going to have to do to comply and what it is going to cost. They are going to have to get involved in that sort of thing.

When the CBCA was introduced, the CBCA was passed in 1975 and corporations were given five years to file new articles of incorporation and in effect reincorporate themselves and those that didn't were dissolved on December 15, 1980, but there was a five-year transition period during which corporations could choose their time to shift over from the Canada Corporations Act to the Canada Business Corporations Act and they did that by adopting new articles and filing them with Ottawa.

I understand that led to a significant number of filings and it got to be a bit of work for everybody. The approach that's been--

Mr. Chairman: About December 1, 1980, weren't most of the filings?

Mr. Levitt: There were a lot made at the end and I expect, although we haven't seen it yet, we will be seeing a lot of acts to revive corporations.

Mr. Chairman: Mr. Spensieri mentioned the insurance errors and omissions insurers took a beating on that.

11:40 a.m.

Mr. Levitt: The approach embodied in the bill is found in section 274 and the approach is basically that there would not have to be a reincorporation filing, but the old act would go out of

existence and the new act would come into existence without Ontario corporations being required to take any formal steps. Section 274 simply provides that on the day the act comes into force, any provision of the articles or bylaws of a corporation that contravenes the bill would be deemed to be amended so as not to contravene it.

I think it is important to note there should not be a paper filing burden imposed by the transition. It is also important to note that section 274(2) provides specifically that corporations may amend their articles to conform to the act. There is no appraisal right of dissent under section 183 in respect of amendments made under this section.

One example where a corporation would want to amend its articles to comply with the act might be, say, where the articles have a quorum provision in them that provides for a quorum that is less than the minimum quorum of directors at a directors' meeting permitted by the new act. The articles would be deemed to be amended to provide the statutory minimum, but it is desirable to have the articles themselves, the paper that is shown to lawyers, bankers and people like that appear to be in order on its face.

So a corporation could effect an amendment to put it in order on its face and shareholders would not have an appraisal right simply because the corporation was bringing itself into compliance with the new act. That is consistent with the transition provisions in the CBCA, where in effect corporations that were coming under the CBCA had one shot at amending their articles without fear of the appraisal remedy and that was the time when they continued because they could put in the articles of continuance anything that would have been permitted under articles of incorporation filed under the CBCA.

Mr. Breithaupt: Along with anything--

Mr. Levitt: Along with anything that was required, so they could in effect go beyond what was simply required to conform to the CBCA.

Mr. Breithaupt: One time.

Mr. Levitt: One time.

Mr. Spensieri: Surely a quorum change is not necessarily a housekeeping matter. It could affect substantive rights.

Mr. Breithaupt: It could.

Mr. Levitt: It could, but I guess it would be a question of bringing it into line with the legislative policy the province has expressed in the new act. That is perhaps not the best example, but it is just the one I could think of.

Mr. Chairman: Excuse me, may I bring the committee up to the moment. Mr. Coombs has agreed to come back since his section as a national energy program is severable from the other members of CBA. He has agreed to come back tomorrow afternoon at two o'clock

and we will push on to the clause by clause, so I have asked the CBA men to go on. The chartered accountants here have a certain timing problem with meeting us this afternoon, so there is a little juggling.

Mr. Hebb: Mr. Chairman, I wonder if I could just make one comment on that agenda. I understand the Toronto Stock Exchange submission tomorrow is going to be to the effect that certain of the NEP provisions should be expanded to cover the brokerage industry. I presume that is also the thrust of the Midland Doherty submission. In view of that I am wondering if it might be more helpful for members of this committee if you were to hear Mr. Coombs before you have the submission from the TSE and Midland Doherty. I don't know whether that is possible in terms of the schedules of the TSE or Midland Doherty.

Mr. Renwick: If that is possible, Mr. Chairman, I think that should be done. I assume that will mean getting in touch with the exchange and with Midland Doherty to make certain they can come. If they can, then presumably Mr. Coombs should go on after the task force on churches and corporate responsibility. That would depend on the clerk clearing it.

Mr. Breithaupt: Mr. Chairman, if I could just speak to that point, it is unfortunate that the time passes rather quickly when we do interject and make other comments that sometimes cause a presentation to become slightly disjointed. It seems to me though that the way things are available to us now, it would be better perhaps to see if tomorrow the stock exchange and Midland Doherty could attend at two o'clock, because if that happened, we would be certain to have the time available to complete the presentation that Mr. Coombs would have tomorrow morning.

I think we are trying to squeeze a little too much in here and we may not be giving the balance and the opportunity to have the presentations that may be wanted to be made to us. That would then allow, I presume, the chartered accountants to complete their presentation if three quarters of an hour is sufficient. If it is not sufficient, then we should know that now in case we have something else to sort out.

Mr. Chairman: They can go over a little this afternoon. Perhaps what we could do here, Mr. Coombs, could you switch to 11 o'clock tomorrow?

Mr. Coombs: I am in your hands, Mr. Chairman.

Mr. Chairman: We will try then to move the 11 or 11:45 Toronto Stock Exchange and Midland Doherty presentations on to two o'clock, with Mr. Coombs taking 11 o'clock. How is that?

Mr. Renwick: I think that is perfect. I think we should indicate to the exchange and to Midland Doherty that Mr. Coombs will be making his presentation to us in case they want to have somebody here while Mr. Coombs is speaking.

Mr. Hebb: I have one other suggestion, Mr. Chairman. Mr.

Levitt has not quite finished. We had planned to be here tomorrow and later today at any event, so he could well put off the completion of his remarks.

Mr. Chairman: Could you, until 11 tomorrow morning?

Mr. Levitt: Sure.

Mr. Chairman: The points you have to make, are they crucial at this point or is tomorrow morning as good?

Mr. Levitt: No, tomorrow morning would be all right, whenever. I am in your hands.

Mr. Chairman: All right. We do want to hear your entire presentation before clause by clause.

Mr. Renwick: I want to make comments so they can be thought about before we get to the section. I think the shorthand method that has been adopted in section 274 has a lot to commend it. I am wondering whether this shouldn't be the usual saving clause to save and protect people's rights as they exist at the time of the change. It seems to me that for us, by statute, to amend a large number of provisions of the constitution of a corporation in such a way that it would affect existing rights, maybe we should have the standard saving clause to protect those rights.

I am not asking for a response but it is a matter that went through my mind. Perhaps we should deal with that when we come to that section.

Mr. Chairman: We could perhaps deal with that tomorrow morning. Thank you for your presentations and for your flexibility in your attempts to accommodate us.

The Institute of Chartered Accountants of Ontario, Messrs. Dalglish, Knight and LaFlair, if you would come forward please and identify yourselves.

Mr. Knight: My name is David Knight. I am with Peat, Marwick, Mitchell and I am chairman of the institute's committee on corporations and security law.

Mr. Dalglish: My name is Keith Dalglish. I am with Thorne Riddell. I am president of the Ontario Institute of Chartered Accountants.

Mr. LaFlair: I am Peter LaFlair. I am director of professional services with the Institute of Chartered Accountants.

11:50 a.m.

Mr. Chairman: Thank you. Are there three spokesmen or one?

Mr. Dalglish: Mr. Chairman, I have a statement after which all of us would be available for questions.

Mr. Chairman: Would you proceed with that?

Mr. Breithaupt: Could the clerk make a copy of that so that we could have copies?

Mr. Chairman: You don't have copies of that?

Mr. Dalglish: We don't have copies. It is rather fresh.

Mr. Breithaupt: Perhaps we could make copies afterwards so that we will have that--since we don't have Instant Hansard.

Interjections.

Mr. Dalglish: Mr. Chairman, thank you very much and thanks also to friends in the bar association for allowing us to proceed this morning.

I would like to thank you for the opportunity to participate in this most important process of drafting the law which governs the corporate citizens of our province. We commend you on the time and effort extended by each of you to ensure that Ontario's corporate legislation continues to reflect the best interests of its inhabitants. It is with this end in mind that our institute has commented on and suggested changes in the Corporations Act and the Business Corporations Act as the legislation has evolved over the years. We are pleased that many of our suggestions have been accepted and are included in the legislation.

We believe the fact that Ontario's business community has been able to function well and grow is to a large measure due to the trust the many people using them have been able to place on corporate financial statements. To a large extent, our submissions have related to financial statement disclosure and audit requirements, both of which we feel could affect this trust. These areas are also central to our professional training and responsibilities.

During the drafting process for this current bill, we have been afforded the opportunity to provide comments and suggestions. We believe that this approach of soliciting comments from interested groups is worthwhile, as it enables a discussion of technicalities and a clearing up of misconceptions on a timely basis without the substantially greater amount of time which would be required had it been necessary to bring what would be relatively minor points to this forum. This no doubt enables you to more profitably direct your limited time resources to the discussion of matters of principle.

We are all aware of the separate federal and provincial entities comprising Canada and of the need for separate legislation to reflect their individual requirements. However, we encourage any efforts to make legislation the same or similar across the country, which would reduce duplicative effort and promote efficiency and comparability. We therefore commend the many evidences in this bill of provisions paralleling those of the Canada Business Corporations Act, which enactment in 1975 culminated a lengthy and intensive

study of corporation law. Many of Ontario's ideas became part of the federal act at that time.

The bill before you continues a Canadian trend of including extensive financial statement disclosure requirements as part of the regulations, which in turn are expected to incorporate the provisions of the Handbook of the Canadian Institute of Chartered Accountants. We are proud of this legislative recognition of the effort expended by our members in ensuring that the handbook reflects the best current thought for financial statement disclosure. The cost of keeping the handbook up to date is substantial. Many hundreds of hours are volunteered by chartered accountants and their fees support over \$2 million of research costs yearly. It is therefore gratifying to see that the work is appreciated.

Pursuing this particular bill further, we can say that we do not have any remaining concerns save one. That concern relates to the proposed provisions for the granting of an exemption from the audit requirements as set out in section 147(2). The granting of an exemption to any corporation that is not an offering corporation would be dependent only on the judgement of an individual as to whether the exemption would be prejudicial to the public interest. We certainly have no reason to doubt the integrity, intent or fairness of the current director, but none the less continue to be concerned for the following reasons:

(a) We perceive a discretionary rule of this kind as being in conflict with the general objective of creating law which is definitive and self-enforcing.

(b) We believe the economic and regulatory environment is such as to put Canadian-owned public corporations into direct competition with substantial nonpublic corporations under foreign control. Section 147 will provide a potential exemption from audit for such nonpublic, foreign-controlled corporations which is not available to Canadian-owned public corporations.

(c) The act does not attempt to elaborate on the reference to the public interest, nor to lay down rules or guidelines as to the considerations to be taken into account by the director in making the determination required of him. As we believe the private individuals in this country have widely differing perceptions as to what constitutes a public interest, we believe that the director's determination must be ultimately subjective. The absence of specific rules or guidelines for the director would have the effect, over time, of establishing standards based on the director's previous determinations as to when an audit exemption would or would not be prejudicial to the public interest.

We feel it is more useful to discuss which companies should be subject to an audit requirement than those which should not. An audit serves a useful purpose for any enterprise having public accountability. Public accountability goes beyond the financial sense only, and exists when a company has widely-held securities, has a significant socioeconomic impact or uses significant amounts of funds from the general public.

We support the use of a size test, such as is set out in this bill, as a convenient way of establishing a limit below which a company is not considered to have any significant public accountability. As our contention is that companies having public accountability should be audited, however, those seeking exemptions for a company exceeding the size test limits should be able to show there is a public accountability and anyone granting such an exemption should be charged with looking at such criteria. We would be most happy to provide clarification on any of our presentation and we will entertain any further questions you may have.

Mr. Breithaupt: Mr. Chairman, I am wondering if, again, this section is with us because of a relationship to the Canada Business Corporations Act. Is that the case?

Mr. Howard: No.

Mr. Breithaupt: This is quite separate. The purpose of my question was to find out, of course, if there was such a requirement there and what the experience might have been with the planning of exemptions. But I guess that cannot be accommodated. Perhaps Mr. Howard could tell us if there are other provinces who in their corporations acts have this kind of situation whether it can an exemption and how it has been used.

Mr. Howard: Mr. Chairman and Mr. Breithaupt, the director, under the Canada Business Corporations Act, has certain powers in a similar area, but it is different. The provision we put in here is unique.

I would thank Mr. Dalglish for his kind words. Of course I am coming down to retirement, so I probably will not be the director granting exemptions. But as I have indicated to the institute from time to time, because they have raised their concerns with me, we propose to spell out guidelines, if you will, in the regulations and although it appears at first blush that the director is going to be sitting there making a subjective decision in his own discretion, it is our plan that the various interested groups, like the Ministry of Revenue, will be given notice of hearing.

We will not be rushing into hearings. There will be quite a period of time to give people an opportunity to present cases in opposition to granting exemptions, and also following our old practice of full, true and plain disclosure, we are going to demand that the applicant provide all kinds of information. We are going to make it very difficult for anyone to get an exemption.

Mr. Breithaupt: Could you explain to me, Mr. Howard, what are the general expectations of what those exemption rules would be? What are the kinds of situations in which an exemption might be sought, in your expectation?

12 noon

Mr. Howard: What comes to mind quite quickly is the Ontario subsidiary of an American corporation.

Mr. Breithaupt: A wholly-owned subsidiary?

Mr. Howard: Wholly-owned or (inaudible). This American subsidiary is in competition with Ontario corporations in the same line of endeavour. The Ontario corporation would not be entitled to an exemption, and clearly the American subsidiary--if I have anything to do with it--would not be granted an exemption so that it would have an advantage over the Ontario business corporation in the same field.

Mr. Breithaupt: But what circumstances can you envisage for granting the exemption? What sort of things do you expect the guidelines by regulation or practice to contain?

I realize you are saying there are going to be some guidelines and it is not likely that this will be granted readily, and there are going to be hearings and other opportunities to sort out quite clearly just on what circumstances this might occur. It still seems such a change although, as you say, the exemption exists in a similar area federally. I was just wondering how you foresee this taking place.

Mr. Howard: I find it very difficult at this point to try and frame guidelines. But another obvious situation is where the applicant is a beneficiary of public funds in connection with its business. It is not going to get an audit exemption because the ministry that is advancing the money wants to have a full audit.

Mr. Breithaupt: Almost everybody in Ontario gets government funds for something or other, so there should not be too many exemptions if that is the rule.

Mr. Eaton: Under what circumstances are you going to give any exemptions at all? Why are you going to give exemptions?

Mr. Howard: A good many of our corporations are hip-pocket corporations with a husband and wife, but they are business corporations. Their assets and revenues are beyond the statutory exemption, but they would come and ask for exemption and, depending on the facts and circumstances, they may be granted the exemption.

Mr. Eaton: Those are the kinds of circumstances you would be looking at?

Mr. Howard: In granting the exemption or refusing the exemption the director is going to be assisted by, for example, the Minister of Revenue and other ministries that may be concerned. But in the drafting of the regulation, when the regulation is drafted, it will be exposed for comment to the institute, and the institute is well aware that we respond to their recommendations and suggestions.

I believe early in the summer I did put out an initial first draft, and I have not given it any thought since then, but I can assure you that that was only an initial first draft, and a final draft regulation dealing with the audit exemption would be better prepared.

Mr. Breithaupt: But in this instance, and now we have a copy of the submission before us, I take it the approach is that really neither clauses (a) or (b) are particularly favoured by the institute. Or is it only the exemption portion that is more particularly of concern?

Mr. Knight: We do favour clause (a). We have some difficulty with clause (b) because we believe that it is very difficult for the reader to determine in what circumstances the corporation would qualify for an audit exemption.

Mr. Breithaupt: You would rather see anything spelled out here then to be somewhat more precise than back to the regulation approach?

Mr. Knight: That is correct. If exemptions are to be granted to corporations which do not fall within the size test, then we would prefer to see the exemptions speak to matters of some definition of what the public interest is. It might, for example, require the director to take into account the significance of the corporation's dealings with society, its overall business size.

The director did mention whether or not the corporation is the benefactor or beneficiary of public funds. We think that is a valid consideration. If the corporation has a large number of employees, for example, we believe that it likely should require to be audited. Whatever the conditions are for audit exemption, we would prefer to see them spelled out in the act, or at least some more guidance given in the act.

Mr. Breithaupt: Can you think of examples, in addition to what Mr. Howard has spoken to, where these exemptions would be sought?

Mr. Mitchell: If I may just interject at this particular point, my understanding is that the people before us are not in disagreement with (a), and (a), I guess, is existing. The only thing that has changed is that the amounts have been increased. They are in disagreement with (b) in respect of the fact that they have not yet seen the regulations drawn up, which will be drawn up and which will be circulated to them for comment.

Mr. Breithaupt: It is at least uncertain, if not--

Mr. Mitchell: That is right. I think the commitment has been that once those regulations are prepared the fact that this is in here at this point in time will not necessarily be, if you will, a last chance for them to have input. Once those regulations are prepared, prior to their going through they will have the opportunity to comment, and it may well result in some change at that point in time to allow the protection that they are looking for to be included in those regulations. I think Mr. Howard indicated he did have a draft that has been circulated, but certainly the regulations will be. I do not know how long it will take, quite honestly, to have them prepared.

Mr. Howard: Hopefully, if this bill goes through this month, then by this time in 1983 the bill and the regulations should be in force. We are allowing a year's lead time for people to make these amendments we are talking about in the transition area, and also to draft these regulations. The regulations here are not the only ones. They are very extensive and very complicated regulations.

I understand the points the institute is making, but all I can say in response is that I would be reluctant to write into subsection 2 or into the statute itself specific grounds for exemption. The grounds should be spelled out in regulations, and regulations, as you know as lawyers, are easily changed. To change the legislation is quite a process. That is why we have kept it, shall we say, sort of loosey-goosey, and left it to the regulations.

If you look at the regulation reference, section 270, clause (g), at the top of page 177, it says, "prescribing requirements with respect to applications to the director or the commission for exemptions permitted by this act and the practice and procedure thereon." It is in the area of these requirements. These requirements can be so exhaustive in the case of the application for audit exemption that those who cannot meet them would be reluctant to make the application.

Mr. Renwick: I am not particularly satisfied with the regulation question. I think the section of the bill, section 147(2), would stand regardless. If the Lieutenant Governor in Council did not make any regulations, it would still stand. The director, in good faith, would have to exercise the power which is granted to him after consideration of it, so I do not think the operative part of that section should depend on the regulations.

12:10 p.m.

If there are regulations, fine. If there are to be regulations, there is the perennial problem of the fact this committee never sees those regulations so we do not have any opportunity to discuss the content of them.

I want to ask whether I clearly understand the subsection that is of concern. The only item that distinguishes subsection 2 from subsection 1 is item (iii) of clause (a) of subsection 1. I take it that items (i) and (ii) of clause (a) of subsection 1 are covered by the opening words of subsection 2. What we are saying is that corporations larger than those delineated by item (iii), somehow or other can apply for an exemption.

Am I correct in the reading of that and that your concern is the open-ended nature of the ambit of what the other tests would be?

Mr. Dalglish: That is right.

Mr. Renwick: Both as to the uncertainty and also whether it is constrained to talk only about corporations which are marginally larger than those specified with respect to assets. If

it was a notched kind of provision, I think everybody understands you have to have a little flexibility with numbers.

Mr. Breithaupt: It is more than that.

Mr. Renwick: If my understanding is correct, it does seem to me it is quite open-ended and I would think from the point of view of the director I would be very concerned to have that responsibility. I do not know how the director would exercise his judgement on the question unless there is something in the statute.

We are going to run into the problem under the regulations question throughout this bill, that the regulations will not be available. They will be available at some other time. But when we are talking about this kind of regulation, I think we should have some clear indication from the ministry as to what their intentions are with respect to that regulation when we consider this section of the bill.

Mr. Chairman: Do you wish to respond to that, Mr. Mitchell?

Mr. Mitchell: I recognize the points Mr. Renwick has raised and I recognize the concerns the representatives of the institute have raised. I would suggest when we get into clause by clause, perhaps Mr. Howard may be able to answer more clearly the questions raised by Mr. Breithaupt and Mr. Renwick.

I can appreciate the institute's concerns about exemptions. I think here, as I stated before, the regulations will lay down some firm ground rules as to where the exemptions may be granted. When they are circulated to the institute we may find that those draft regulations will result in good discussion and perhaps resolve the concerns the institute has at the time. That would be my hope.

Mr Howard: Mr. Renwick, the regulations will not be exposed just to the institute for comment. They will be available generally for public review and comment, including members of the House. The other point I wanted to make was, first, of course we are only talking about the nonoffering corporation applying for exemptions and, second, if you look at section 250, the right of appeal, a person aggrieved by a decision of a director to grant or refuse to grant exemption under section 147 may appeal to the divisional court. So the director is not exactly on a frolic of his own in this whole area.

Mr. Renwick: It is a little tough on the divisional court. I don't think they would be thankful.

For us to provide the court with that kind of open-ended section, I think probably they would make some adverse comment about the legislative process in the course of being faced with that kind of question. I am glad the point has been raised. I don't think we necessarily would have seen the significance of it ourselves. Perhaps when we go through the bill, we can deal with it.

Another minor comment I want to make. This is the first time

to my recollection that in at least two, and probably a number of other places, there is a cross reference to the Income Tax Act of Canada and it just strikes me as somewhat anomalous. We don't often have references in our statutes in Ontario to a statute of the federal government.

I don't know whether it is of great importance, but I notice we incorporate by reference the whole of the definition of arm's length from the Income Tax Act of Canada. It seems to be kind of an unwieldy way. I suppose it is quite easy for a practitioner who is in the field all of the time dealing with that kind of question to be alert to what changes have taken place and definitions of the statutes of another jurisdiction. It is just an anomaly and I don't think I have ever recalled the Business Corporations Act having such cross references before now. Maybe it does.

Interjection.

Mr. Renwick: It does.

Mr. Chairman: Are there any comments or questions to these gentlemen from the chartered accountants' institute?

Mr. Knight: Mr. Chairman, if I may, I do have one further point which escaped my notice until this morning, in the spirit of "ands" and "ors". If I could direct Mr. Howard's attention to section 147(1)(a)(iii), "the corporation has assets not exceeding \$2,500,000 or sales..." I think the intent there would be "and" rather than "or."

Mr. LaFlair: I believe the current act has an "and" in there while the federal act has an "or," but for a different purpose.

Mr. Howard: I confess I was influenced by the section of the federal act when I was drafting this. This can be changed to "and" on the advice of the institute.

Mr. Breithaupt: Another blow for liberty.

Mr. Knight: If you do change this to "and" it then has the same effect as the federal one, the size test is somewhat smaller.

Mr. Breithaupt: But it has the same effect when those assets and sales are being considered.

Mr. Knight: Yes.

Mr. Mitchell: When we get to clause by clause, Mr. Chairman, we don't see any problem with changing that.

Mr. Howard: If the institute feels quite strongly about it, I will make the necessary recommendations. It is not for me to decide. It is up to the committee.

Mr. Renwick: I know it is an imposition in a sense, but

would it be possible for one member of the institute to be with us when we actually go through the bill, clause by clause, particularly those sections that are available?

12:20 p.m.

I anticipate, according to our schedule, that we will be likely reaching that point maybe tomorrow afternoon, but probably Thursday and Friday morning. I think it would be helpful to us if one member of the institute was able to be present, because members of the bar are going to be present to assist us as well and I think it would be quite helpful.

Mr. LaFlair: I think that would be possible.

Mr. Dalglish: Mr. Chairman, if that is your wish, we can certainly comply. Mr. Knight has volunteered and I also have a volunteer in Mr. LaFlair.

Mr. Renwick: That would be most helpful to us. It is a laborious task but I think we have to be sure we understand it and we do need protection from the bureaucracy on occasion.

Mr. Chairman: Any other comments? May we recess until two o'clock, at which time we carry on with the Board of Trade of Metropolitan Toronto and the Ariadne group?

The committee recessed at 12:24 p.m.

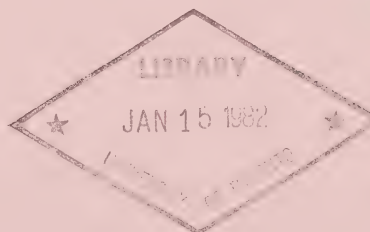
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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BILL 6, BUSINESS CORPORATIONS ACT

TUESDAY, JANUARY 5, 1982

Afternoon Sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

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Clerk: Forsyth, S.

From the Ministry of Consumer and Commercial Relations:
Howard, B. C., Executive Director, Companies Division
Mitchell, R. C., Parliamentary Assistant
Wells, E. J. K., Director, Company Law Branch

Witnesses:

From the Canadian Bar Association (Ontario Branch):
Hebb, L., Chairman, Committee on Bill 6

From the Board of Trade of Metropolitan Toronto:
Gillespie, J. B., Chairman, Corporation Legislation Committee
Oughtred, A. W., Member, Corporation Legislation Committee
Steel, D. A. B., Vice-Chairman, Corporation Legislation Committee

From the Ariadne Group:
Waitzer, E., Member

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Tuesday, January 5, 1982

The committee resumed at 2:09 p.m. in committee room No. 1.

BUSINESS CORPORATIONS ACT
(continued)

Resuming consideration of Bill 6, An Act to revise the Business Corporations Act.

Mr. Chairman: We have a quorum. We shall proceed with the Board of Trade of Metropolitan Toronto. Messrs. John Gillespie, David Steel and A. Winn Oughtred, would you please come and identify yourselves from my left to right.

Do we have one or three spokesmen?

Mr. Gillespie: I will start off. Then David Steel and Winn Oughtred will deal with portions of our brief.

Mr. Chairman: You have a prepared statement?

Mr. Gillespie: Yes, we submitted a brief.

Mr. Chairman: That is exhibit two. Carry on, please.

Mr. Gillespie: Mr. Chairman, I am glad to have this opportunity to express some views of the board of trade on Bill 6. I thought it might be helpful to the committee for me to start off with a bit of background of the board's involvement in this legislation as it has evolved through various drafts. I think this background may be of some assistance in the committee's understanding some of the philosophy behind the specific comments that are made in the brief.

The board's original position with regard to Bill 6 generally was one of opposition because we considered the present Ontario Business Corporations Act was well drafted. We recognized it needed some updating to furnish some additional rights and remedies to shareholders, minority shareholders in particular, but we were concerned that the whole thrust of the legislation was to achieve uniformity with the federal act and our feeling was that the federal act was not as well drafted, was not as workable and was not as good a statute. Accordingly, we recognized uniformity was something that was desirable to a degree but we felt not at the expense of good draftsmanship and possibly provisions we thought were inappropriate.

I think it should be remembered that the federal act applies in large measure to the larger public companies in Canada and those are to a large extent served by the large firms of accountants and lawyers centred here in Toronto. The Ontario act obviously covers companies of that kind as well, but the vast majority of the companies covered by the Ontario legislation are small, private

incorporated businesses and our concern was, and I suppose still is, that most of those will require changes in their articles as a result of the new bill, and all of them will require new bylaws. Our view was that this seemed to be to a large extent unnecessary and the aims of the bill as we saw it could well have been achieved by adding provisions to the present legislation.

In those circumstances, one of the points the board was most concerned about, and it is referred to on page eight of our brief, is the thought that there should be a transitional provision. If there was a period of grace before changes had to be made, this would be of great convenience to most companies. The way it stands now, it would appear provisions that are inconsistent are amended by operation of law, but the difficulty is that nobody is going to be in a position to know the precise nature of the amendment, and this will be a very unsatisfactory state of affairs for any company.

The ordinary process, which we would expect the company would take, would be to examine such provisions and take the necessary steps to amend them, specifically by either amendments to the articles or bylaws. This takes time. In the case of a public company, it seemed to us there should be sufficient time for them to go through an annual meeting, depending on when their fiscal year ended. That is one point we were concerned about. When the present Business Corporations Act came in, there was that sort of period of grace for most of the provisions and it worked very well. We thought it would be highly desirable to have perhaps a year in these circumstances.

If I could move on, an example of the sort of change we felt was unnecessary from a practical point of view and seemed to be put forward only in order to achieve uniformity with the federal act was the concept of abolishing par value shares. As far as the board could tell from reading the background material for the federal act, the reason given for abolishing the idea of par value shares was a concern that in the case of public listed companies that had common shares it was possible they might have a par value of \$1 and be trading on the exchange at \$25.

This was felt to be confusing to unsophisticated investors, but that very seldom occurs now in the case of common shares with public companies that are almost entirely no par value. The concept of par value shares is really used for redeemable preferred shares. I suppose it is fair to say that in most cases it would be for small private companies rather than the larger public companies. It is a useful concept. It enables a company in a simple manner to issue shares for a consideration which would be in excess of the paid-up capital, thereby creating contributed surplus.

The federal act, and Bill 6 has followed generally the formulas that are in the federal act, has provisions which are designed to permit this in appropriate cases, but the board feels those are extremely complicated and will be most difficult to deal with from the point of view of the smaller companies and their less sophisticated advisers. It still seems to be a very difficult thing to discover in many cases what the paid-up capital is, and that is an important question to be asked in connection with tax considerations. This is an example, as we have described in the

brief, of a change for which we do not understand the merit, except uniformity, and we think the advantages of leaving that concept intact outweigh any question of uniformity.

2:20 p.m.

An example of provisions that appear in Bill 6 which follow the federal act revolves around the question of right of dissenting shareholders--shareholders who disagree with a particular course of action which the corporation is proposing--to have their shares bought out by the corporation at a market value price. The present section 100 of the Business Corporations Act is limited to private companies where there is no market for the shares of a dissenting shareholder. It also applies to fundamental changes only, such as amalgamation, sale of undertaking, the addition of restrictions on transfer of the shares, and the change of jurisdiction.

The new section in 183 of Bill 6, which is similar to the corresponding section in the federal act, applies to public companies where there is also a market for their shares. It also applies to changes which are much more numerous and much less significant than the ones which are listed in the present Ontario act.

The board of trade originally opposed this widening of the concept of a dissenting shareholder having this right, particularly in the case of a public company, because where there is a public market, if he does not like what is happening the dissenting shareholder is able to dispose of his shares and move on to another company. The idea of having the corporation buy his shares may seem superficially attractive in that the gigantic corporation is solving the problem of the poor defenceless shareholder, but really the only result of it is that the other shareholders of that company are the ones who are required to suffer in order to give the dissenting shareholder his remedy. It seemed to the board that this was not really necessary when he was able to dispose of his shares anyway.

The situation in Bill 6 has been extended by the provisions of section 187 of the bill, which is referred to beginning on page seven of our brief. Again, this is an extension of this concept of whenever you disagree with what is happening, or things occur which you do not like, you are entitled to have your shares bought out. In the situation dealt with in section 187, the right is triggered if somebody acquires 90 per cent of the shares of the company, but the word "acquired," in particular, gave us some concern because this could result from gifts or inheritance.

It could be triggered in all sorts of situations which the board considered to be inappropriate. That section, in effect, goes the federal act just one better. I do not think there is any corresponding provision, and the board feels that it is an unnecessary extension of that principle.

There is another point I wish to deal with and it involves a problem which is present in the wording of the present act. It is not a new problem caused by the wording of the bill, except that because of the terms of the bill the problem is worsened in the

sense that it is spread around in various other sections of the act.

It is referred to on the first page of our brief in a very narrow sense. I would like to deal with it today in a slightly broader sense. It is the use of the phrase "the realizable value of the corporation's assets." It appears in the present act in the definition of insolvency. That is relevant under the present act I think principally in connection with a test for the declaring of dividends. Under Bill 6 it does not appear in a definition of solvency, but it appears as a test which really corresponds to that. It appears in various places. It appears in sections relating to the making of loans to shareholders; redemption of shares; declaration and payment of dividends; payments out to dissenting shareholders under the appropriate section; payments to aggrieved shareholders under the appropriate sections.

The concern that the board has in that connection is that we think it is too imprecise. If some words could be added to indicate that it meant the realizable value on a going-concern basis, rather than leaving it vague as to whether it is that or the realizable value on a breakup or a dissolution basis, we think that would be a great improvement.

The problem is the directors have to meet and decide on these points--whether a dividend is to be declared, whether shares are to be redeemed. Whatever the point is, they have to decide. They need advice as to whether it is proper to do so under the legislation. They cannot get that kind of advice from the lawyers who say they do not know what the realizable value is. They say we had better ask the auditors. The auditors have the same problem. They say: "What do you mean by the realizable value? Do you mean on a going-concern basis or do you mean on a breakup basis? There is any number of ways of doing it."

So you are left with really a lack of proper guidance in making a decision. It becomes a very important matter because under section 129(2) of Bill 6, the directors are responsible for an amount paid out in contravention of those various sections and that would be the case if the wrong calculation were made as to the realizable assets of the corporation.

In addition to section 129(2), the board has a specific concern about section 129(1). It is referred to on page five of our brief. That it seems to the board makes the directors virtually the guarantors of the correctness of their decision when they issue shares for a consideration other than cash and they guess wrong as to the value of that consideration. The board considers that if the directors act properly in accordance with section 133 in that they use proper standards of diligence and care, that should be the test and they should not be subject to a specific penalty because with hindsight they had guessed wrong. This seemed to us to be the position under section 129(1).

2:30 p.m.

I think those are the specific items I wish to draw to your attention. If I may, I would like to ask David Steel to deal with the points that were made starting in the middle of page two of our

brief, and also with the material under the headings "Insider Liability" on page six and "Auditors and Financial Statements" on page seven.

Mr. Steel: Thank you, Mr. Chairman. The board's concern about the prohibition of subsidiaries holding shares of parent companies relates to the special situation of a wholly owned subsidiary. The prohibition as applied to the wholly owned subsidiary owning shares with the parent company would seem to prohibit or restrict two fairly frequent forms of transaction that are in use where permissible in corporate reorganizations.

For instance, in the case of repurchase of a corporation's own stock, which is permissible when done directly, subject to the insolvency test Mr. Gillespie referred to, it has very frequently taken the form of giving the shareholder the option to have his shares repurchased either directly by the corporation itself, which gives him a dividend treatment in relation to a large portion of the purchase price under the Income Tax Act, or as an alternative, by having the shares purchased by a subsidiary where this is permitted by the relevant legislation. The purchase by the subsidiary would give the shareholder a capital gain treatment under the Income Tax Act in lieu of a dividend treatment.

Where you have a corporate restriction such as the one proposed in Bill 6, a choice has to be made either to deny this choice to the shareholders in this type of reorganization or to attempt to make good the deficiency of not being able to use a subsidiary by having a major shareholder incorporate a sister company. This, of course, has a number of other associated disadvantages and difficulties that are not present where the repurchase is made by a wholly owned subsidiary.

Another transaction that would be prohibited or restricted by the proposed provision is where a very substantial repurchase of shares is being contemplated from the shareholders of the company and the financing for this repurchase is something that would require the corporation to borrow. If the repurchase is being done directly by the parent company, then the shares under section 35(6) are either cancelled or restored to the status of unissued shares. This renders it impossible to give any lien to a bank, for instance, that might be advancing the moneys required to make the purchase. It would seem quite in order for this transaction to be carried out by a wholly owned subsidiary. The shares could be held by the subsidiary and could be pledged to the bank, which would provide some security for the bank loan for the purchase price.

As you can see, the board's concerns on this particular provision are of a technical rather than a philosophical character. It would certainly seem there is no real reason that the board of trade can see why these particular types of transactions should be prohibited in the case of a wholly owned subsidiary.

Another provision of Bill 6 which gives the board some concern is the inclusion of part IX, which applies the concept of insider trading liability normally dealt with with regard to publicly traded corporations, and applies this to what is defined in Bill 6 as a non-offering or privately held corporation. In the

view of the board the various concepts applicable to insider liability are concepts which are derived from trading in the public marketplace and are just inapplicable and inappropriate for transactions in shares of non-offering corporations.

For example, the concept that appears in subsection 5 of section 137 of specific confidential information which, if generally known, might be reasonably expected to materially affect the value of the security, has a number of problems attached to it when applied to a non-offering corporation. In the case of most non-offering corporations, none of the affairs of the non-offering corporation is generally known. The owners are not in the habit of making their affairs generally known.

Similarly, any specific confidential information that might reasonably be expected to materially affect the value of the security, the valuation of securities of non-offering corporations is a matter of some difficulty, and chartered accountants, business advisers and others make a good living out of valuing non-offering corporation securities. As you can see, it is a very tricky question to apply a liability to an insider of this kind of a company with respect to information that if generally known might be reasonably expected to affect the value of the shares of that company. For this and similar reasons, the board feels that part IX is not only unnecessary, but actually could be positively harmful in connection with quite normal transactions in securities of companies of this kind.

It is certainly true that a provision that was generally applicable both to publicly traded companies and to non-offering companies was included in the legislation up until 1978. At that time, it was repealed on the grounds that it was an overlap provision with similar provisions in the Securities Act, and certainly I do not think it has been felt in the business community--certainly not as far as the board of trade is concerned--that there has been any great loss felt as a result of the repeal of those sections and the removal of their applicability to non-offering corporations during the last three and a half years.

Lastly, Mr. Chairman--and I would apologize for raising this rather technical point--in section 147 there is provision for a corporation to be exempted from the requirement to have an auditor reporting on its annual financial statements. This is something which is in the existing legislation with the consent of the shareholders. Bill 6 departs from that approach by giving the director discretion to permit exemption from the crown to have an order to audit the financial statements; but again, that discretion is only exercisable if all the shareholders consent.

2:40 p.m.

In the view of the board, if all the shareholders consent, the director should not have any discretion, and conversely, if he is to have some discretion, then there should not be any requirement for all the shareholders to consent; it should be the one or the other.

I do not have any other points on the brief, Mr. Chairman, thank you. I guess Mr. Oughtred is the next in line.

Mr. Gillespie: Mr. Chairman, I should like to ask Mr. Oughtred to deal with the material in our brief on shareholders, which commences on page four, and that relating to directors and officers on page five.

Mr. Oughtred: Mr. Chairman and members of the committee, I refer first to our comment with respect to section 98 of the bill, on page four of our submission.

Section 98 provides for the making of proposals by shareholders and the including of such proposals in proxy solicitation fields, obviously in connection with public-offering corporations. This section is modelled on section 131 of the Canada Business Corporations Act, with one glaring omission, and I refer to 131(5)(e) of that act. This provides that a corporation need not include a proposal where the provision of the section is really being abused to secure publicity for the person making the proposal, and is not being used in the best interests of the corporation. The board of trade feels the equivalent of the subsection in the Canada Business Corporations Act be included in the bill if that section is to survive.

My next comment is with respect to section 104(6) of the bill, in connection with the reimbursement of requisitionists' expenses. The present wording of the bill provides that the corporation shall reimburse the expenses of someone who requisitions a shareholders' meeting unless they have not acted in good faith and the interests of the shareholders generally.

We feel that is something that should be left to the meeting of shareholders or of the shareholders of the corporation itself, most appropriately at the meeting that has been requisitioned, as to whether or not the corporate assets will be applied to covering the expenses of the requisitionists in calling that meeting. At the bottom of page four and at the top of page five of our submission, we have included draft language to this end that we would like to see in section 104(6) of the bill.

I then move to part eight, under directors and officers, and refer you to our comments on section 123 at the top of page five in connection with vacancies on a board of directors, and the right of a surviving quorum to fill such vacancies. I would refer you particularly to section 101(7) of the Canada Business Corporations Act, which permits a quorum of directors in a Canada business corporation to fill a vacancy that occurs by reason of--I shall read this: "If a meeting of shareholders fails to elect the minimum number of directors required by the articles by reason of disqualification, incapacity or death of a candidate, the directors elected at the meeting in question, provided that they constitute a quorum, can fill the vacancy."

This sort of situation obviously would apply to public corporations where a slate of directors has been named and, via an information circular, proxies have been solicited on that basis, and then for some reason--incapacity, death or whatever--one of the

proposed nominees cannot stand for election. We feel that rather than forcing a new shareholders' meeting and provided a quorum can elected, that quorum be elected and the quorum can fill the vacancy created by the death, incapacity or whatever.

We then move on to our comments at the bottom of page five with respect to section 134(4), a rather technical comment in connection with reliance on financial statements by directors, officers et cetera. Section 134(4) now provides that a director or officer, when relying on financial statements prepared by officers of the company or auditors, is entitled to rely on those with respect to the directors' liability provisions provided they are prepared in accordance with generally accepted accounting principles.

We feel there are certain cases where financial statements are not prepared according to generally accepted accounting principles. Provided the liability question does not relate to that, we see no reason why the directors should not be able to rely on those statements. We have all seen qualified auditors' certificates which make sense in certain business circumstances and we feel, as pointed out in our comments on section 134(4), that the generally accepted accounting principles reference really should not be there.

My last comment is with respect to section 135, the indemnification of directors section, particularly section 135(2) which provides in the case of a derivative action--that is an action brought on behalf of the corporation--where a director is involved, that the corporation can indemnify him with the approval of the court. We see no reason why the corporation should require court approval in that circumstance and not in the normal subsection 1 circumstance. We feel court approval should not be required and should not be included in that subsection.

Mr. Gillespie: That completes our submission.

Mr. Chairman: Thank you, gentlemen. Mr. Breithaupt, do you have any comments or questions?

Mr. Breithaupt: There are a couple of comments I would make. I will do this as they come to mind. One is with respect to the matter of the application for exemption, section 147(2). This is an interesting, albeit brief, comment that is made here with respect to saying, in effect, "If there is any discretion at all, we do not need the section."

This morning we heard the views of the chartered accountants with respect to this, particularly to the extent--and I paraphrase them--that while 147(1)(a) was acceptable, they preferred not to have a thing called 147(1)(b) unless the reasons for the kinds of opportunities during which exemptions would be granted would be very clearly spelled out.

Perhaps we could give a copy of their submission to the Board of Trade of Metropolitan Toronto delegation because their view is quite the reverse. They found it acceptable to have circumstances where a corporation, not being an offering corporation and having

the other two points in section 147(1)(a) as well, could ordinarily be exempt from the requirements of the audit.

This was met by Mr. Howard's comment that the whole theme of exemption would be very rare and that detailed regulations will be developed under section 270(g) to deal with the possibilities of exemptions and also to acknowledge that where public funds are involved, perhaps where large numbers of employees are involved, the size of a portion of the market, however it might be, then exemptions clearly should not be sought because they would not be granted.

This circumstance leads us to see, from the ministry's point of view, that an exemption would be rare in any event and that the pattern really would be, as 147(1)(a) sets it out, for usual corporations, except perhaps for some sort of a notch provision where the size of assets was just a bit larger. This seems to be the only practical exemption through which a closely held corporation, husband and wife, whatever it might be, would probably make it into that exempt status for audit purposes.

So it is quite a different approach from the one you have taken, in that exemptions would be apparently much like the availability of hens' teeth.

2:50 p.m.

Mr. Gillespie: If I could reply briefly to that, Mr. Chairman, maybe it would not be too remarkable to think that the auditors might have a different approach to this problem. I think, generally speaking, auditors take the approach that there should be an audit in all but the most extraordinary circumstances. I do not think the board really is anxious to debate precisely what the circumstances should be when discretion should be exercised to grant this exemption. I do not think we really directed our minds to that precise exercise.

What puzzled us was if you just had subsection (a) and you did not have (b), that is the kind of thing I guess we have lived with for quite a while, perhaps in both statutes from time to time. Maybe it is not too awful, but it seemed to us to be a good thing to have subsection (b) where some discretion could be exercised if you did not quite fit into (a) and it seemed appropriate.

That seemed to be all right, but what really puzzled us was if you get all the shareholders to agree, and that is the only basis on which you can apply for the exemption, that really might well be the end of it. We thought subsection (a) was a good test as a kind of statutory test and then (b) gave you some flexibility. We were content to leave it to whatever the regulations would be, but it did not make any sense to us to say before you can even go and make your case, you have to have answered the most important test, if you like, under (a)--

Mr. Breithaupt: Which is all the shareholders.

Mr. Gillespie: --which is all the shareholders. It just did not seem to make much sense to us.

Mr. Breithaupt: Perhaps Mr. Howard might have a comment, Mr. Chairman, as to the requirements for unanimity.

Mr. Howard: In response to Mr. Gillespie on that point, if all the shareholders agree, there is still the public interest aspect that may have to be considered. What the shareholders want may not necessarily be in the public interest.

Mr. Gillespie: With respect, I don't really see what the public interest has to do with it. No large public company is ever going to be in this position at all. It seems to me the auditors are there to protect the shareholders, not to protect the public, in a case of this kind, and I really fail to see why that is relevant.

Mr. Howard: It could very well be a company that is enjoying public funds in its undertaking, though it is not a large public company. The shareholders might all agree, "We should be exempt from an audit," but the Ministry of Revenue would not agree, the Ministry of Industry and Tourism would not agree, and Treasury and Economics would not agree.

Mr. Gillespie: If someone can't fit himself into subsection (a), then the discretion is still there, even if you have not made it necessary to have all the shareholders' consent.

Mr. Howard: The fact that all the shareholders consent is not the answer.

Mr. Gillespie: That would not be the sole test under the board's suggested wording.

Mr. Chairman: Mr. Wells, did you have any other comments or answers to make regarding the presentation?

Mr. Wells: I had a few. However, they are just going to brief because I would like to take a look at the submission in detail.

Mr. Mitchell: I should like to point out, if I may, to the members of the board of trade, we just this morning received the briefs on our desks--at least I did when I arrived in Toronto this morning--so we have not really had an opportunity to go through it in detail, but Mr. Wells will make the comments.

Mr. Wells: Just a few, if I may, in general terms. Mr. Gillespie made several points, so I will go through them in the same kind of order as he did it. His first concern seemed to be with respect to the transitional provisions contained in section 274 of the act, and this was raised this morning by Mr. Renwick as well, as to whether or not there ought to be some kind of period of grace or changeover period.

All I can say is we are going to take a second look at that to see whether we should change what we are doing, but in my view, just off the top of my head, the vast majority of corporations in this province which are governed by the Business Corporations Act

are small corporations--Mom and Pop outfits if I can use the phrase--and I am not sure that the concerns raised by the board are necessarily that valid and that they will be, in fact, put to a lot of expense or difficulty because of the enactment of this bill. It is just one comment I would like to make.

With respect to no par value shares, this has been kicking around for a long time and I am aware of the board's position with respect to that. Now I have seen a lot of problems with par value shares, especially in articles, with respect to amalgamations where people cannot get their share structure straight, with respect to reduction of capital. They keep getting lost when they are reducing par value et cetera.

I do not know that there is any real problem with respect to the use of the no par vehicle to affect the kinds of things that Mr. Gillespie was talking about in his presentation today, about redeemable preferred shares for small corporations. It seems to me that can be done with no par value shares. I do not think it is that difficult for the small corporation, a small-town lawyer and a small-town accountant to do it. That is my view there.

Then we got on to dissenting shareholders, I guess the compulsory put. The idea behind the bill is that if there is a float of some kind where a public corporation has bought up a lot of shares, I would tend to think that the shareholder who is in the minority is going to use that, and not go to the corporation and put his shares to the corporation because if there is a float, people will know the market value. I think the guy is taking a great risk in trying to put the corporation to some great expense to get more out of the company rather than just selling on the market. This is designed to make a market for the corporation, and make the corporation make a market for the shareholder.

Mr. Breithaupt: I must say I wonder how effective a market you can make in a circumstance like that.

Mr. Howard: It protects the locked-in shareholder.

Mr. Wells: With respect to financial assistance, the question of realizable value of the assets of the corporation came up and I share the concerns of Mr. Gillespie in that respect as to how you do determine the realizable value of the assets. But to make one blanket statement in the act that it is going to be on a going-concern basis, or whatever basis--and as he commented, there could be in any number of ways you can do it--would to my mind, be locking us in rather too tightly.

There may be some circumstances where, in fact, you are better off to value it on a dissolution basis. I have seen reports from accountants saying, "Quite frankly, we do not think this corporation can carry on." Now, if they are in that kind of position, maybe you are not supposed to be valuing it on a going concern basis. That is just a concern I raise. I am not saying no. With respect to section 129, the board is not a guarantor of, shall we say, a bad guess. I think that deserves another look by us.

Mr. Steel went on to discuss the problem of the subsidiary not being able to hold shares in its parent. That has been the law here in Ontario for quite some time. Under the present act a subsidiary can't. I can see the points raised by Mr. Steel with respect to certain alternatives that could be advantageous to shareholders. I have problems where perhaps the subsidiary that holds shares in its parent amalgamates with that parent, and I presume that could be worked out if we accept what the board is proposing. Although nothing was said, I presume, with respect to those shares held by a subsidiary, they wouldn't be voted. Am I right?

Mr. Steel: Yes.

Mr. Wells: Okay. On insider trading, I have no comment at this time. I believe Mr. Howard dealt with the audit exemption Mr. Steel raised. Mr. Oughtred dealt with section 98, the shareholder proposal and its possible abuse, and suggested if someone wants to get publicity that should be covered as well. If you look at section 98(5)(b), in my mind it is covered. It clearly appears the proposal submitted by the shareholder is primarily for the purpose of enforcing a personal claim or redressing a personal grievance or for a purpose that is not related in any significant way to the business or affairs of the corporation. It seems to me if somebody is on a publicity gambit that section covers it.

With respect to Mr. Oughtred's suggestion that the shareholders vote on whether the minority should be recompensed, it seems to me in all likelihood the minority will never be recompensed. That's my feeling. They just get killed. On the question of the vacancy in candidates, I personally know one case where that did happen when a board member was proposed for election and he died. It does cause a problem. I think we should look at that. With respect to the generally accepted accounting principles set out in section 134(4), I believe this was another suggestion of the Institute of Chartered Accountants of Ontario. I just wonder what examples there are of non-GAAP accounting. I have seen qualified opinions et cetera. Is that a non-GAAP principle?

Mr. Oughtred: I guess our first concern was with the private sector whereby an officer could rely on, or a director could rely on prepared internal statements presumably by a company itself, by its financial people, which may not be prepared in accordance with generally accepted accounting principles for whatever reason, be it business or otherwise.

If the director feels he can rely on that statement and it has been prepared responsibly, should GAAP have to apply to it before the director can use that section as to its protection? Certainly, I think Mr. Steel wants to give you a better example probably of where a corporation may not follow GAAP.

Mr. Steel: Oh, yes. I think there are quite a few corporations, real estate companies for instance, companies in the real estate development business, follow the kind of principles that are put forward by their trade organization, the Canadian

Institute of Public Real Estate Companies, and in large areas do not follow generally accepted accounting principles.

I think there may also be certain companies in the oil and gas business which follow accounting principles that are different from generally accepted accounting principles, what you might call special accounting principles applicable to a certain type of businesses.

I think that is the type of company that the board of trade is concerned about where they are in a special line of business which have their own accounting principles applicable to that line of business.

Mr. Gillespie: I suppose there are two other possibilities. One is where it is an ordinary company but for good reasons there is a qualified auditor's report. As we have suggested, if the qualification does not relate to the particular problem at hand, then we did not see why that could not be relied on and the other point about the internal unaudited statement, how is anybody ever going to know whether it is in accordance with GAAP until you get it audited. It just seemed to be impractical if it was to have any meaning in that context at all.

Mr. Howard: We have to remember, of course, Mr. Gillespie, that this bill is designed for the non-offering corporation and the offering corporation. I am certainly looking at section 134(4), a director of a large offering corporation. I think a conscientious director is going to expect to see a financial statement prepared in accordance with generally accepted accounting principles and nothing else.

Mr. Gillespie: I do not know why that would be so, Mr. Howard. I think we have given about three or four examples where--

Mr. Howard: The ministry officials are--the committee's problem is in preparing revisions to legislation. We consult you or we give you the opportunity to comment. We also give the bar association an opportunity to comment. We also give the Institute of Chartered Accountants of Ontario an opportunity to comment but we have to make a decision. Now in this case, we favour what the institute has asked for and they have it at the moment.

Mr. Renwick: Mr. Steel, I think you have dealt with the question of the indemnification of directors. Is that correct?

Mr. Oughtred: I did, sir.

Mr. Renwick: I am concerned about the provision of insurance and what appears to me to be, shall I say, a weakening, I am not certain quite how to express it, of the standard of care required of a director. If I may look at sections 133 and 135(4) of the bill and compare them with sections 142 and 145(3) of the act, it seems to me that what we are being asked to approve is that a corporation may indemnify a director in connection with the discharge of his duties, provided he acted honestly and in good faith with a view to the best interests of the corporation, but could indemnify him had he failed to exercise the care, diligence

and skill that a reasonably prudent person would exercise in comparable circumstances. Am I reading that correctly?

3:10 p.m.

I think that the present act states that you could only take out insurance to indemnify a director or officer where there had been no contravention of the standard of care in its entirety, that is, not only the obligation to act honestly and in good faith in the best interests of the corporation, but in addition the person must have met the standard of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

It seems to me that there is a substantial change in that provision in this bill because it almost reverts to the position that we were in before we inserted the standard of care. I do not see why a company should have the power to take out insurance to benefit a director who has failed to meet the standard of care that his office requires.

Mr. Gillespie: Mr. Chairman, perhaps I could just make a comment on that. I think this is one example where the board of trade would be prepared to congratulate the ministry on following the example of the federal act.

Mr. Renwick is perfectly correct in pointing out the difference. The problem that has been experienced with the present section in the present act is that you do not need an indemnification and you do not need insurance if you are never careless. If you never depart from the second branch of section 133, which requires you to exercise the care, diligence and skill that a reasonably prudent person would, then you never need any of these things.

It has been the board's view throughout the history of all these sections as they have changed around among the old Ontario act, the old federal, the new Ontario, et cetera, that the present situation we find in the federal act, and which is followed in Bill 6, is the one that should prevail. If you comply with the first branch of 133(a) and you act honestly and in good faith with a view to the best interests of the corporation, but you have fallen short of (b), and that is the very reason why you are being sued--if you had not fallen short on either of them, you would not be sued--then that is the time when you require an indemnity and/or insurance, and it seems to us you should be entitled to have it.

Mr. Breithaupt: Once in a while you may have acted under (b) quite satisfactorily, but the court in its wisdom may decide you did not, and therefore some opportunity to have insurance coverage is surely prudent.

Mr. Gillespie: Yes. If you did not act honestly and in good faith, that is something else again.

Mr. Breithaupt: That is quite separate.

Mr. Gillespie: But if you acted honestly and thought you

were being diligent, but you were found not to be diligent, our feeling is that you should have protection. That is no abuse and should not be a problem.

Mr. Renwick: I must say I find it quite upsetting that that standard which we worked so long and hard to get into the act should now be whittled down by saying that the corporation can indemnify the director against his failure to exercise that responsibility and to meet that standard of care. I have no difficulty with the question that I should be able to insure myself against negligence. I do not have any problem with that, but I certainly do not understand why the corporation should be permitted to take out insurance to indemnify me against my failure to meet the standard that is required.

Mr. Breithaupt: It is required of you rather than the corporation; therefore you would prefer to see a more personal responsibility.

Mr. Renwick: At the present time, if any director is concerned he must take out the insurance and pay for it himself.

Mr. Spensieri: You don't want it to be a cost of doing business, is that what you are saying?

Mr. Renwick: No, I am not only saying it should not be a cost of doing business. I am saying we spent a great deal of time originally, years ago, trying to get the standard of care into the statute. Now, by reshuffling the words, we are saying that the company can indemnify that director for failing to meet the standard which the company is entitled to receive from that director.

Mr. Breithaupt: At the expense of the company and not the director.

Mr. Renwick: We argued long and with a great deal of attention to get the phrase, "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances." Those words were gone over with a fine-tooth comb to get them to be acceptable. In a sense, it is perhaps not as high a standard as some of us thought was required, but disguised as a claim for uniformity that we should accept a federal whittling down in 1975 of what we obtained in Ontario in 1970 seems to be asking a great deal of uniformity. I am interested to know that my reading of it appears to accord with the representatives of the board.

Mr. Chairman: Has the ministry any answer to this? What do you want to call it, Mr. Renwick, a deletion of the reasonable-man test over in the indemnification section?

Mr. Renwick: Yes.

Mr. Chairman: Is there a policy on this?

Mr. Renwick: This was obviously a decision that was made by the ministry, to whittle down our act in the interest of meeting the uniformity test of the federal act.

Mr. Howard: That is one way of putting it, Mr. Renwick. It was not consciously made as a decision of that kind. I am looking at my notes here and there is nothing to indicate that any of us had any problem with this. As I have said before, and I know you don't like this, we are simply tracking the Canada Business Corporations Act and these provisions for uniformity. Any differences between our sections or subsections here and the Canada act are purely minor.

Mr. Gillespie: I don't think there is a difference with regard to the power to indemnify. I think the difference comes solely in the question of insurance.

Mr. Renwick: Oh, yes, no question about that. That is exactly the purpose of the redrafting as I read it. Let me put the question in a different way. Would you tell me whether or not you have had any difficulty whatsoever with the present act with respect to the question of the standard of care or the question of insurance under the present act? Have you had any representations about the bogymen that was put up in front of us, which was that if we ever put in this standard of care in the first place, we would never get anybody to act as a director. It was laid before us that there was going to be a wholesale resignation of directors across the province. I never did hear of anybody who then did resign.

3:20 p.m.

Mr. Mitchell: Perhaps, Ted, could you answer?

Mr. Wells: I have received phone calls, not letters, and they are few and far between, I must admit. People have been worried and upset about it.

Mr. Renwick: About what?

Mr. Wells: Basically, about the problem of the corporation not being able to indemnify somebody who is found negligent. That is putting it quite simply. I believe Mr. Hebb over there from the bar association--

Mr. Renwick: But there are no letters on file about that?

Mr. Wells: No, not that I have on file.

Mr. Breithaupt: Surely it is not so much a matter of not being able to indemnify the person as it is to obtain the possibility of insurance coverage that might or might not indemnify.

Mr. Wells: That is right.

Mr. Breithaupt: Because that would be quite separate from the corporation doing the indemnification which, I do not think, we should countenance in the slightest.

Mr. Chairman: Excuse me. Would you come up to one of the microphones. I think Mr. Hebb perhaps has something to assist us here.

Mr. Hebb: Maybe I could just speak to the policy point for a moment. Mr. Renwick, I do think there is something more than uniformity here. Mr. Gillespie made the comment that under the existing law, a company is precluded from purchasing insurance for the very purpose for which directors need insurance, and that is the failure to live up to their standard of care. Nobody is going to insure anyone, obviously, for the other breach that is possible, the breach of fiduciary responsibility, but the failure to live up to the standard of care is something for which directors require insurance.

In my experience, practitioners have sort of looked at that provision in Ontario during the last 10 years and wondered what it was all about. What was the purpose of putting that insurance provision in there which precluded a company from buying insurance for its directors for the very purpose for which the directors needed the insurance? Thus, I would say, the federal approach, which is embodied in the bill, is a significant improvement. As a practical matter--

Mr. Renwick: It depends on where you sit.

Mr. Hebb: Let me put this to you. If I undertake to sit on a board of directors, I am going to be looking at the risks that are attendant on my service on that board of directors, and I may receive a director's fee. I am going to be concerned about my potential liability. If the corporation is not going to purchase insurance or provide insurance for me to cover my risk, then presumably I will get it myself. If the corporation is not going to provide the insurance for the director, then I assume the director is going to do it for himself. What that is going to mean is simply larger directors' fees. I do not really think that your point advances the position in bottom-line terms. I really think if you do not permit the corporation to do this directly, then the directors' fees will be increased to cover it.

Mr. Breithaupt: But this is being done directly for that grey area surely.

Mr. Hebb: It is being done to cover the directors in the area of breach of duty.

Mr. Briethaupt: Where they may have felt they were acting quite prudently--

Mr. Hebb: Right.

Mr. Breithaupt: --but the court finds otherwise, shall we say.

Mr. Hebb: Right.

Mr. Breithaupt: There is no question about the earlier portion, that is to say, 133(1)(a), honestly in good faith, because that obviously is beyond the realm of anyone obtaining insurance for.

Mr. Hebb: Exactly.

Mr. Gillespie: If it is of any assistance to the committee to know what the practice is, I think it is just about universal. If the company has directors' liability insurance, there is one policy. It covers the company, it also covers the directors, and there is a split of the fee in an Ontario company, which there would not be in a federal company.

If it were a federal company, the company would pay the whole insurance premium; if it were an Ontario company, the premium would be split and part of it is charged to the directors and part of it is absorbed by the company, but the management of the company then goes to its lawyers and says: "We want to comply with this subsection in the Ontario act that deals with insurance. How do we split the fee?" Nobody knows, so it gets split on some basis; I suspect that the normal split is 90-10, and my own guess is it probably should be 10-90.

That is what happens and it seems to me that is just a silly situation to have continuing. I do not think it accomplishes anything.

Mr. Breithaupt: Why will this change it? You will not have the accounting matters change with respect to an assignment of a proportionate benefit or cost against a director's indemnity, will you?

Mr. Gillespie: If the company is entitled, as under the federal act, to provide this insurance, then it will pay the whole premium.

Mr. Breithaupt: The matter will just be at an end then, and the directors will come into it or not, depending upon their particular circumstances.

Mr. Gillespie: Some companies carry this kind of insurance, and some companies do not; but if they do carry it, it will all be paid for by the company.

Mr. Renwick: The point has been elucidated. I am being told that if they do not get it out of one pocket they will get it out of another pocket. That is all right; I do not mind if they get it out of the other pocket. If the net effect is that there is a washout of the transaction and it comes by way of director's fees to the director, that is fine. He pays income tax on his director's fees and you get all of the problems that are involved with that, but that is fine. That is a judgemental decision and if they want to make it so refined that they equate the additional director fee to the net cost to the director of the insurance, that is their privilege to do it. I cannot stop all of those methods by which it is done.

All I am saying is I find it upsetting, with the time and attention that was put on all aspects of the present sections of the bill, that because the federal government saw fit to whittle it down, that we are now going to be asked to whittle it down, as well.

I have no problem with the way Mr. Hebb indicates that it will be met. If that is the kind of problem it is, well and good, let them meet it that way. I just find it passing strange that we should be asked to consider that amendment. I can think of no particular problem we had many years ago in dealing with this question in the first report to get any standard of care in the act at all.

Mr. Chairman: If we turn the section right around and we say that under no circumstances can a corporation ever purchase insurance for incompetence or for negligence, and then we find that a director is not prudent enough on his own to take out insurance, I think we may be faced with a policy consideration with a situation where a loss occurs through a director being bumbling but acting in good faith, and then that loss is just going to be moved over to the shareholders and ultimately to the public.

That is why I think the permissive side of allowing a corporation to purchase insurance is a good argument to be made. Would that not be the ultimate upshot of this perhaps, Mr. Gillespie, because if the corporation can purchase it and the director does not, then who ultimately bears the loss?

Mr. Gillespie: If the director is not only imprudent but also impecunious, I guess the person who has the right of action bears the loss, or the public ultimately.

Mr. Eaton: But under the same standard, the corporation would be purchasing it for employees of the corporation, wouldn't they? (Inaudible).

Mr. Hebb: I think it usual to have the directors' policy cover at least the senior management group as well as the directors.

Mr. Eaton: Why shouldn't the directors be included and protected just the same as the employees are?

3:30 p.m.

Mr. Gillespie: I think you will find it this way in the New York statute.

Mr. Breithaupt: It is the particular directors' personal decisions as to whether or not they should or will take out their own personal coverages.

Mr. Hebb: I would have thought a better approach to Mr. Renwick's concern would be in terms of disclosure. The federal proxy rules require at the present time that premiums paid for directors' and officers' insurance be disclosed in the proxy circular. That is an approach that Ontario might well consider taking. It seems to me that that provides some sort of response and some sort of protection for the shareholders, lest this thing be abused.

Mr. Breithaupt: How would we know what proportions within the premium should actually be charged for the directors'

proportion? We have had the comment that what is 90-10 should perhaps be 10-90 in its ratio. There would have to be, I presume, some sort of a standard accounting expectation as to the division of the premium in order to make those figures meaningful from one company to the next.

Mr. Gillespie: It does not get divided under the federal act. They have the power--

Mr. Breithaupt: But I am saying under this situation you could see some division.

Mr. Hebb: It would not have to be divided. If you were to permit the corporation to take out a comprehensive policy that covered both the directors and officers, that total premium would be disclosed. I am not sure, but maybe there is a requirement that there be some split in the present proxy vote.

Mr. Breithaupt: It is not in the federal act. It simply must be referred to and accounted for without that division, which I agree might be quite a meaningless exercise.

Mr. Hebb: I make that comment just because it is basically public companies that presumably we are concerned with that have to file proxy material and that information then could be available in the proxy circular.

Mr. Chairman: Are there any other questions for these gentlemen? The next group is with us.

Mr. Renwick: I have one other I am at a loss about. It is Mr. Steel's comment about the insider trading provision for nonoffering companies. Mr. Wells indicated he did not have any comment on it. I did not know whether that meant he had no views on it or not.

I have a little difficulty in accepting the board of trade's position on that, but I think I am open on it. Could you help me a little bit with your comment?

Mr. Steel: Perhaps it would be helpful, Mr. Chairman, to look at the provision as it was when it was part of the existing legislation prior to 1978 when I think it was repealed. At that time it was sections 148, 149, 150, 151 and 152 of the Business Corporations Act. There was no distinction made between offering corporations and nonoffering corporations. It included reporting requirements for insiders very much in a parallel with the inside reporting requirements of the Securities Act, provision for the inspection of reports and so forth.

Mr. Gillespie points out that there may have well been a discrepancy between the insider definition of the people who were identified as insiders in this predecessor provision, in which we were required to file the reports, and the then provisions of the Securities Act. In any event, the repeal was enacted in 1978.

In its revised form, in part IX of Bill 6, the reporting

provisions have been omitted so that all that you are left with is subsection 5, being the liability section. This is the section which contains as a key part of it the requirement that in order for the liability to take place, the insider must have made use of specific confidential information for his own benefit or advantage that if generally known might reasonably be expected to affect materially the value of the security.

The concern of the board is, as we stated before, that it is very difficult to say there is any specific information regarding a nonoffering corporation that could be said to be generally known because owners of nonoffering corporation businesses are not in the practice of making generally known the affairs of their corporations. That is one big distinction between a public offering corporation and one that isn't.

The second point the board was concerned about as far as the operation of this liability section is concerned was the question of the information which, if it was generally known, could be reasonably expected to affect the value of the security. Unlike the case of a public offering corporation where you have an objective standard as to a security being in the public marketplace and it has a value that goes up and down according to the trading in the public marketplace, in the case of nonoffering corporations there is no such objective standard. The value of the security of a nonpublic offering corporation is highly subjective and is the subject of a whole lot--almost a profession--in the accounting field that is devoted to the valuing of the securities of these nonpublic companies.

It is for these reasons the board feels quite strongly this provision is not required for the protection of the public. The laws of fraud and so on at present in place govern the questions of liability as regards misleading purchases of securities of nonpublic corporations, and in addition to that the provision might be in many cases positively harmful in so far as injecting new and unknown elements into transactions between purchasers and sellers of securities of this type of company goes.

Mr. Gillespie: It was never part of the Ontario law because the section Mr. Steel pointed out referred to an insider and at that time the definition of "insider" read, "A director or senior officer of a corporation that is offering its securities to the public." This type of provision was never in the Ontario law.

Mr. Steel: As applying to nonoffering corporations. As Mr. Gillespie points out, this application of the insider concept to nonoffering corporations is new and highly dubious in the opinion of the board of trade.

Mr. Renwick: I can certainly understand your concern on the question of the valuation of the security and the judgemental question about whether it might reasonably be expected to affect materially the value of the security. I can understand that problem very clearly. I shall reflect on it and think about it when we come to it.

Mr. Chairman: Any other questions or comments? If not, may I thank you for your attendance and assistance. These comments will be taken down and reflected upon later in the clause-by-clause study.

Is the Ariadne Group represented here? Yes.

I would point out to the members that exhibit 3 is the submission of the Ariadne Group. Appearing before us at this point are Mr. Waitzer and Mr. Berman--just Mr. Waitzer.

Mr. Waitzer: Mr. Chairman, my name is Ed Waitzer. Mr. Berman unfortunately had to be out of the country this morning so I will be appearing alone.

Mr. Chairman: Would you carry on with the presentation? Thank you.

Mr. Waitzer: I take it the submission has been circulated and you have all had an opportunity to glance through it. Rather than speak--

Mr. Breithaupt: No, we have only just received it.

Mr. Chairman: As we sat down this morning we received the written submissions.

Mr. Waitzer: I suppose then you are in much the same position as I am, having only had a brief opportunity to thoroughly review the bill not knowing in advance it was moving through the committee process as quickly as it was. Let me apologize at the outset that the brief I have submitted to you is one that deals in general principle rather than in detail, simply because I have not had the opportunity to acquire the sort of fluency with the technical provisions that I might otherwise have if there had been sufficient time.

The suggestions advanced in the submission are by way of constructive criticism. Overall the effort in legislative reform that is reflected in the bill I would submit is an impressive one. It is an area which should be a priority of the Legislature and our criticisms are constructive rather than frustrating towards that effort.

Most of the submissions contained in our presentation are restricted to offering corporations. However in certain instances we have advanced the notion that corporate law should in effect create a new distinction, not one relating to whether a corporation offers its securities to the public but one that is triggered by the size and impact of a corporation--impact in terms of its impact on the community and the variety of constituents that are involved in any corporation.

There are two themes I would like to explore with the committee by way of introducing the written submission. Then I can either respond to questions or go through point by point some of the concepts that are developed briefly in our written presentation.

First, I would urge you to consider the proposals raised in the submission, recognizing that public trust and confidence in the accountability of corporate power is crucial to the continuing vitality of our economic system. I think that is the basis of your legislative mandate today.

The second theme I hope to touch on is that in embarking on significant legislative reform such as that proposed in this bill, the responsible minister as well as this committee should ensure that their decision-making is illuminated by seeking out useful public participation in their proceedings. That perhaps is one of my strongest criticisms of the process rather than the substance to date.

There is a tendency in legislative reform when the effort is restricted to professionals who are engaged in using the act on a technical level from day to day to restrict the effort to one of fine tuning, debugging technical provisions rather than taking the opportunity--which is an opportunity that only comes around once every few years--to stand back, look at the reason for the legislation, the extent to which it reflects public expectations, the extent to which it reflects standards in the corporate community, rather than simply take out bugs, and to see whether anything can be improved at the conceptual level.

Turning to the first theme, I would simply suggest that some of the proposals touched on in our written submission illustrate the tremendous changes that are already occurring today, primarily in corporate boardrooms. We would submit they should be reflected in and encouraged by our corporate legislation. We are all aware of the increasing percentage of independent directors and the establishment of specialized committees of the boards, both of which are dealt with in our submission.

There are other changes that are not as susceptible to statistical analysis or review but are based on anecdotal evidence and our own experience, as well as articles in the press. It appears there is a far-reaching shift in attitude on the part of boards of directors and individual directors. They are increasingly sensitive to their positions and responsibilities and less prone to let themselves simply be devices to ratify the decisions of corporate management. The establishment of board charters, the delegation of policy formulation and monitoring of management to committees, the development of job descriptions for directors, as well as an emphasis on information flows to the board of directors and to public shareholders, are indications of progress.

Rather than supporting governmental intervention to mandate appropriate corporate accountability systems, the proposals suggested in our written submission are designed to encourage continued private sector initiative in this area. Our goal is to change behaviour in order to ensure that it meets reasonable public expectations, rather than to narrowly prescribe legal standards. Hence, for example, we have proposed in our submission disclosure rules concerning director nominees and corporate objectives.

We have also proposed that consideration be given to refining the statutory standard of care in order to reflect our society's

increased reliance on fiduciary concepts in protecting shareholder rights and, indeed, other constituents' rights. Such incremental changes, along with a number of other forces, including peer pressure, should operate to accelerate the pace of change and to enhance corporate accountability by goading private sector action and initiative.

Turning to the second theme, which was the question of process, we find it somewhat remarkable that in response to a bill that has been several years in drafts and preparation, only five general submissions--and I may be out in my numbers now--are being entertained by this committee. Three of them are from professional organizations, which were given the opportunity to participate extensively in the bill's drafting. The other two are groups that are advancing submissions such as those contained in our submission concerning the overall thrust of the legislation. In contrast, other jurisdictions have recognized that reform of corporate right legislation is a significant exercise, and one that merits the encouragement of public participation throughout the process.

Presumably the minister's response to this lack of opportunity for public input is that the proposals were expedited in that they were merely intended to be a contribution to legislative uniformity. I think that underrates the scope of the effort that has been undertaken by the ministry. As we note in our submission, it has gone considerably beyond that in a number of salutary ways. At the same time, there has not been an opportunity to canvass in a public dialogue a number of other issues that are currently the concern of commentators on corporate law, including many that have been raised in other contexts within this province.

There is no question that a major revision of corporate law is a worthwhile exercise, if done properly. The current proposals, however, may short-circuit the very accountability process in the political arena that the bill seeks to strengthen in our economic process. In doing so, it could undermine public confidence and make poor use of an opportunity for significant corporate legislative reform. In response to a previous incarnation of this bill, Jim Baillie, who will be appearing before you tomorrow afternoon, I understand, wrote an editorial--I think it was in May 1980--in the Financial Post. I do not know whether he still holds to his position, so I don't hold it out as his current position, but the editorial, in effect, recommended that parts of the proposals as they then stood, particularly those relating to minority shareholders' remedies, be proceeded with as quickly as possible in view of their urgency and priority.

3:50 p.m.

We also propose that the remainder of the bill be severed off and proceeded with by the Legislature on a basis which afforded a fuller opportunity for consideration and public participation. In the short timespan we have had available to us to prepare our written submissions, we have tried to highlight a number of areas, both substantive and procedural, which we feel merit further consideration and which might be elaborated upon if there is that opportunity for public dialogue.

One suggestion you might take into account, along with Mr. Baillie's, and it is noted in our written submission, is the possibility of reactivating the--I am not sure whether it is the standing or the select--committee on company law. This was a proposal that was advanced and I have a bit of a conflict because I was acting as counsel to staff of the Ontario Securities Commission in a hearing regarding nonvoting shares several months ago.

Mr. Breithaupt: I have a worse conflict because I was the chairman.

Mr. Waitzer: In any event, that hearing illustrates one of the kinds of fundamental policy issues that should properly be before this committee or any committee that is considering corporate legislative reform. One of the recommendations of commission staff to the commission was that the commission recommend to the minister that sort of mechanism for ongoing introspection into our corporate legislation be reactivated so there is a continuing opportunity for public dialogue.

In my haste to put together the submission, I think I indicated somewhere that there would be an appendix which was a code of conduct and, unfortunately, I did not get the appendix in time to get them up. I now have two of them which may be of interest to members of the committee just by way of example; perhaps if they could be circulated.

Mr. Chairman, I am in your hands as to whether you would like me to go point by point through the submission or whether you think it would be more fruitful for committee members to have an opportunity to ask questions as they like. The submission deals with each of the recommendations in some detail.

Mr. Chairman: Go ahead, Mr. Breithaupt.

Mr. Breithaupt: I was just going to suggest it might be well if Mr. Waitzer led us through the submission so if there are points which come up, they could be asked right at the time. The introduction as such, referring to the reforms in the Canada Business Corporations Act, and the other matters, are fairly general. I would think we could perhaps begin, if that is convenient, at page five with the particular points and agree to sit for some extra moments, if necessary, so that Mr. Waitzer is able to make all the comments that he would wish us to have.

Mr. Chairman: Yes. Would you continue, unless there are other comments, with (a) on page five?

Mr. Breithaupt: If you would like to comment on the earlier pages, please do.

Mr. Waitzer: If I could provide an overview. What we attempted to do literally in a matter of days was to bring together some of the proposals which seemed to have gained considerable currency, both in this jurisdiction and others with respect to corporate law reform by those who advocate increased accountability, but who do so saying that it should be done by way

of private sector responsibility rather than by way of government fiat.

That is the philosophical premise from which I start, that rather than prescribe strict standards, rather than require constituency directors, for instance, as some recommend, that private sector leaders be encouraged to assume increased responsibility and, presumably, that will displace the public demand for increased governmental intervention.

In assembling some of the proposals that we could think of in a hurry, they seem to fall within three streams. One is internal corporate governance mechanisms relating primarily to the way in which directors oversee the ongoing management of a corporation, and again we are talking about public corporations or offering corporations, or perhaps corporations over a certain size. The second area had been referred to here this afternoon as shareholder's remedies or minority shareholder rights, and opportunities for shareholders. The third, I guess, is opportunities for shareholders to participate to some degree in the governance process.

On page five, looking at boards of directors, we are of the view that one of the key avenues for improving corporate accountability is to place more responsibility in the hands of directors and to make their role a more meaningful one in the corporate decision-making process. The concept of independent as opposed to outside directors is one that has gained considerable currency both in Canada and the US. I think the most recent statistics that I have seen in the US for public corporations is that over 85 per cent of offering corporations have active outside independent directors.

In a previous draft of the bill the concept of independent directors was a stronger one than is at present found in Bill 6, and we would urge this committee to reconsider what underlies the notion of having outside directors. Presumably outside directors are there to bring some independent judgement to bear, judgement that is not subject to the influence of management which has chosen them, or management which is directing a significant amount of business, whether it is professional fees or otherwise. If, indeed, the committee and the Legislature feel there is some role for that independent judgement, we would suggest the original notion of independent directors replace that which is currently found in the legislation.

The duties of directors are a subject that has for years occupied the attention of commentators, primarily academic, although more recently professional associations. The bar association in the United States has tried to develop model codes refining to some extent what the role and duties of directors of offering corporations should be. If you talk to directors of offering corporations--as did, I think her name was Susan Peterson, who prepared the conference board report--you will find that many of them are somewhat at a loss to know what their mandate is, and frequently find themselves in a situation where they are not at all certain to whom they are accountable and what their role on the

board should be when faced with difficult judgements which directors often face.

We are simply suggesting there that the committee and the ministry should give some consideration to the work that has been done in this area, and give some consideration to attempting to refine those obligations in the statute.

Directors' access to information is an issue that perhaps most people do not think of in reading through the legislation and in considering the role of directors. One would think that as a matter of course directors would be entitled to all information in the possession of a corporation. That simply is not the case.

I have spent a good deal of my time acting on behalf of minority shareholders, dissenting directors, and it is frequently the case that a director who finds himself in a position adverse to management also finds himself handicapped because he does not have access to the information and resources of the corporation, and it becomes extremely difficult to exercise his judgement and to discharge his responsibilities as a director when he is crippled by this lack of information. I suggest to you the act as currently drafted doesn't provide that access as a matter of right.

4 p.m.

The concept of board committees is something that has gained some currency over the years. Most of you will be familiar with the notion of audit committees, for example, something that was thought by many to be quite a radical concept not too many years ago. It is now a statutory requirement and a matter of course in terms of business practice with offering corporations and, similarly, executive committees. Increasingly, large corporations are making use of committee structures, recognizing it is simply impossible for a board of directors to effectively monitor all the various facets of what the corporate organization does.

We are recommending that mechanisms be put in place within the legislation that would encourage offering corporations to constitute standing committees. One that we particularly recommend and which will be touched upon tomorrow I gather, by another intervenor, is some form of social responsibility committee. Again let me stress we are not suggesting these committees be given an express mandate that they be told what they do or how they have to discharge their responsibilities; we are simply recommending they be constituted in that they be required to report on their efforts so that facet of corporate activity becomes more visible and more commonplace.

On the question of director nominations, I think we are simply proposing that the notions of corporation democracy which are recorded elsewhere in the legislation be extended to the electoral process. When we touch on disclosure requirements later, you will see we also recommend that electoral process be more meaningful by making available increased information to shareholders which will both inform their judgement in

participating in the electoral process and perhaps encourage them to participate.

Finally, the role of the chairman of the board: If indeed we perceive the board as being some sort of counterpoint to management, a group responsible to oversee the management of the corporation, it makes sense that the chairman of the board, the person who directs the board, who determines the agendas for that group, also be independent of management, whereas frequently it is the case the chairman of the board is also chief executive officer or in some other way directly tied to the management of the corporation.

Our recommendations with respect to shareholder proposals simply go to refining the mechanism that is already proposed in the bill and making it a somewhat more practical facility for shareholders to take advantage of. The ability of shareholders to participate in the approval of major transactions goes somewhat beyond the current provisions of the bill relating to fundamental changes. It seems, particularly with the proliferation of hostile takeover bids, that management has increasingly taken it upon itself to make decisions which fundamentally alter the nature of the corporation and thereby the nature of the shareholders' investment in that corporation.

The stock exchange has recently taken some initiatives towards increasing the ability of shareholders to participate in approving those transactions, but the stock exchange is limited both in its jurisdiction and in its ultimate remedy. The remedy that it has available to it where its requirements are disregarded is delisting, which is one that tends to prejudice the shareholders more than anyone else.

Disclosure requirements: Again we have tried to bring together some disclosure requirements that came to mind in a short span of time, designed to enhance some of the internal government's mechanisms that we propose earlier in the brief.

I have already touched on disclosure relating to committees and disclosure relating to directors which would make the electoral process more significant. That disclosure goes both to the independence of directors and to the performance and remuneration of directors, the remuneration question being one that was canvassed by this committee some three years ago, I suppose, when it was considering revisions to the Securities Act.

Mr. Breithaupt: It was about 1979 I think.

Mr. Waitzer: My recollection at the time was that the committee felt that sort of remuneration on a disaggregated basis would be a worthwhile disclosure mechanism. As the regulations ultimately evolved, the disclosure was aggregated so that offering corporations are only required to make disclosure of the five senior officers and directors in a lump.

The final disclosure recommendation, going back to the concept of a social responsibility committee, is disclosure of socially significant information.

In terms of shareholder remedies, you will probably have heard a number of these recommendations previously, and I shall not dwell on them. We have some difficulty with the provision in section 20 which liberalizes the ability of a corporation to provide financial assistance to others in the purchase of its own shares. They have some difficulty, not so much with the ability of a corporation to hold shares in itself, but with the ability of a corporation to vote those shares, as I understand the provision in the bill.

Perhaps a technical point, but one which is often frustrating, both in the context of takeover bids and shareholder proposals, is access to shareholders' lists. Among the current provisions, for instance, the 10-day requirement is one which was drafted at a time when information retrieval technology was far less sophisticated than it is today. I suggest that if you consult with the trust companies associations, you will find that, as a practical matter, they can probably satisfy someone's request for access to a shareholders' list in a much prompter manner. In my submission they should be required to do so.

There are some minor drafting concerns with relation to the oppression remedy, and then we come to a conclusion which reiterates our fundamental support for the premises behind the ministry's effort in introducing legislative reform at this time. But we have some concern that the effort has not been as broad in scope, nor has it allowed for the sort of participation which will ensure that the ultimate product is one that we can all be proud of and which will endure for however many years it is until the next time we sit down to revisit this legislation.

I can respond to any specific questions.

Mr. Chairman: To start off from the chair, if I may, will you expand on your comment on section 29(4), regarding the corporation holding shares in itself? In essence you have said you do not want to see the voting rights exercised on those shares, is that correct?

Mr. Waitzer: That is correct. There are a number of instances that I can recall--and I am assuming I understand the intent of the provision correctly--where, for example, shares of an offering corporation have been placed in a subsidiary primarily as a defensive mechanism in a takeover bid contest. In one instance in Quebec, the ability to vote those shares was challenged by way of a preliminary injunction; this was in connection with Campbell-Chibougama Mines, and the Quebec Superior Court granted an injunction but there was never a trial of the issue.

I would suggest to you that in some respects it disenfranchises shareholders if a corporation is able to place shares in the hands of a subsidiary--that is a managerial decision, by and large--and then use those shares in the proxy process, in the electoral process. In a way, it almost defeats some of the mechanisms that were specifically introduced in the legislation in order to provide shareholders with a franchise.

4:10 p.m.

Mr. Chairman: Mr. Hebb, would you get a microphone, if you will?

Mr. Hebb: If I could just comment, I am not sure I am following your comment on section 29(4). It seems to me to basically constitute a prohibition on the corporation of voting shares that it holds, subject to two exceptions, and those are contained in clauses (a) and (b).

One is the situation where the corporation holds its shares as a legal representative which would mean that someone else was the beneficial owner, and the other reference is to the security back provision, which similarly, is a legal representative type situation, where the shares are being held on behalf of another person who is the beneficial owner.

I am very surprised if this or any act permits a corporation holding shares in itself and holding those shares in a beneficial character to vote those shares at its own meetings. To me, that would be an extraordinary result. If I understand you correctly, that is what you are suggesting this bill does.

Mr. Waitzer: That is my concern with what the bill might do. We agree as to policy. I am just taking a look at section 48 a second time.

Mr. Hebb: Is that not the section that provides that when a broker transmits material to the beneficial owners, it is then permitted to vote the shares? So it postulates a nominee type of situation.

Mr. Breithaupt: It is somewhat of an arm's length situation.

Mr. Hebb: My point is the corporation is not the beneficial owner.

Mr. Waitzer: My friend may be right. When I read it the first time in a hurry I did not have--I felt uncomfortable with the scope and perhaps what I could do is go back and take a more careful look at those provisions, and the provisions of the act, and come back to you, or in correspondence, indicate if I do continue to have a difficulty with it, but certainly Mr. Hebb has articulated the policy concern which I strongly support.

Mr. Renwick: I hope Mr. Breithaupt has noticed the last page of this brief.

Mr. Eaton: I was just going to draw your attention to that.

Mr. Breithaupt: I was going to get it framed.

Mr. Eaton: Then company law would be reconvened.

Mr. Breithaupt: It is a fine idea.

Mr. Renwick: We have now got unlimited partnerships, nonprofit corporations, and this whole field--perhaps Mr. Breithaupt should write a letter to the Premier (Mr. Davis).

Mr. Eaton: It is good for another five years.

Mr. Breithaupt: I certainly would be glad to take the instructions of the committee if they wish that to be done. It is nice to see, at least, that in theory--

Mr. Eaton: Are you saying you are still going to have time to be chairman on this committee?

Mr. Breithaupt: I have lots of time. In theory, it is nice to see that at least our committee was presumed to act in a "more disciplined and public manner." Whether that was the case or not, I am not too sure, on some days. I appreciate the boost for what we have modestly attempted to do.

Mr. Renwick: Perhaps we could just put it on the basis that we are awaiting a call.

Mr. Eaton: Is that all right, Mr. Breithaupt?

Mr. Breithaupt: They also serve who only stand and wait.

Mr. Chairman: Mr. Renwick, are those your comments solely?

Mr. Renwick: I have one other question. What is the Ariadne Group?

Mr. Waitzer: The Ariadne Group is simply a consulting group. It is a private corporation.

Mr. Renwick: It is a consulting organization? It does not have any significant position in any public corporations or private industry, or so on?

Mr. Waitzer: No.

Mr. Renwick: Does it have its origin here? Or does it have its origin in the United States?

Mr. Waitzer: No, here. It is simply a private corporation.

Mr. Howard: Mr. Renwick, this morning when we were discussing the nonshare or the not-for-profit corporation, I intended to add a further comment at that time that, as far as we are concerned in the ministry, we would appreciate having the select committee on company law develop the not-for-profit corporation.

Mr. Renwick: There is a ground swell developing here.

Mr. Howard: I think that should be top priority. I have been trying to get at this for years.

Mr. Breithaupt: Keep a note of this page in Hansard as well, Mr. Chairman.

Mr. Howard: My question to Mr. Mitchell was, how do we get before the select committee with this particular task?

Mr. Mitchell: You have left it in good hands, I am sure. You have left it with Mr. Breithaupt, provided he has the opportunity and time. As has been pointed out, time could be--

Mr. Breithaupt: It will be precious.

Mr. Howard: With respect to Mr. Waitzer, this bill and earlier versions, as you well know, had very wide public exposure and requests for cognizance. Now, when Bill 6 becomes law or should I say if, as and when Bill 6 becomes law, and probably a year after enactment, we will have a mechanism in the ministry whereby recommendations made to us for amendments will be referred to a committee of the bar and the bar will review these recommendations and perhaps annually come forward to the ministry with recommendations it feels should be made and people like yourself would work through such a committee.

Mr. Waitzer: I admire your patience in persevering with this piece of legislation through the years and through the various drafts and share with you experience on how, when legislation of this consequence, once it reaches final form, the theory of annual reviews or mechanisms for review tends to dissipate somewhat. The emphasis is no longer there. I would prefer to see more of the effort go into getting the best possible legislation at the outset.

Certainly, I would file any recommendations I saw in terms of improvements with that committee of the bar but, for example, in the Securities Act, there are all sorts of technical difficulties with various provisions, particularly the takeover provisions. There has been a committee addressing itself to those provisions for well over a year now in isolation, and I suspect it will be several more years before we can debug what were simply anticipated problems from the outset.

Mr. Breithaupt: And that is new legislation.

Mr. Waitzer: That is new legislation.

Mr. Howard: So we will look to hear from you in the future, Mr. Waitzer. Not necessarily me because, if anything dissipates, it will be me disappearing on retirement.

Mr. Wells: I just have one question of Mr. Waitzer, just a point of information really, so that when I am reviewing what you have given us and have had a chance to really digest this, I will know better how to respond to it.

On page seven of your brief, basically there is a theme running throughout your submission with respect to the social impact of corporate actions and how that affects society, and so on, and how that should be controlled. You indicate there is a

general consensus that the function of directors should include--and then you name four points, the fourth being consideration of the social impacts of corporate activities and consideration of the views of constituencies other than shareholders concerning such activities. I was wondering if you could elaborate on where this general consensus comes from.

Mr. Waitzer: I may qualify that by saying I don't think there is yet a general consensus among corporations on how they should respond to those concerns, but I think if you talk to directors or senior managers of large corporations in Canada, they recognize this is a significant area of responsibility they have to concern themselves with in terms of managing the resources they have available to them in being effective as private sector institutions in our society, given changes in public expectations of the way large institutions work.

Many of those corporations have in one way or another tried to formalize some sort of mechanism, however tentative, as a way of responding at the board level. You will increasingly find Canadian corporations that have what they call a public affairs committee or a social responsibility committee. You will also find specialized management within most large corporations that deal precisely with these kinds of impacts that corporations have.

Sensitivity to the issues is growing. What I am urging on you is that the legislation should encourage that as a response to public expectations.

Mr. Wells: I take it you are concerned primarily with the larger offering corporations.

Mr. Waitzer: That is correct, the larger corporations. Within the conceptual framework of this act, I think I would say offering corporations, but it may be that at some point, either now or in the future, we would want to step out of that framework of offering and nonoffering and develop some other framework that measures size of resources and impacts on society.

Mr. Chairman: Thank you. That will end the presentation. If there is nothing else to add, we will reconvene tomorrow morning at 10 o'clock with the Taskforce on Churches and Corporate Responsibility. I assume the treasurer mentioned there is someone we do not know. That William Davis is someone other than the one we are most familiar with.

The committee adjourned at 4:22 p.m.

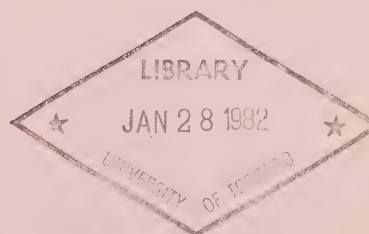
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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BILL 6, BUSINESS CORPORATIONS ACT

WEDNESDAY, JANUARY 6, 1982

Morning Sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

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From the Ministry of Consumer and Commercial Relations*

Howard, B. C., Executive Director, Companies Division
Mitchell, R. C., Parliamentary Assistant
Wells, E. J. K., Director, Company Law Branch

From the Ministry of the Attorney General

Yurkow, R., Legislative Counsel

Witnesses*

From the Canadian Bar Association (Ontario Branch)*

Coombs, M.,
Hebb, L., Chairman, Committee on Bill 6
Westlake, B.,

From the Taskforce on the Churches and Corporate Responsibility*

Creighton, P.,
Davis, B.,
Hutchinson, M.,
Ridout, J.,

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday, January 6, 1982

The committee met at 10:05 a.m. in committee room No. 1.

BUSINESS CORPORATIONS ACT
(continued)

Resuming the adjourned consideration of Bill 6, An Act to revise the Business Corporations Act.

Mr. Chairman: With my glasses on, I see a quorum of seven. May we proceed. The first witnesses of the morning are from the Taskforce on the Churches and Corporate Responsibility. Following them, at 11 o'clock Mr. Coombs will go on directly. I have just spoken to the other representatives of the Canadian Bar Association. I thought it perhaps wise to go on with Mr. Coombs. You will recall it was the national energy program he was specifically going to deal with. Then if there is time following his presentation, we would go back to Mr. Levitt. If there is not time, we will carry on with either Mr. Levitt or Mr. Hebb later on this afternoon. We will fit them in; they are somewhat flexible.

Would the group from the Taskforce on the Churches and Corporate Responsibility come forward, please, and identify yourselves from my left, or north to south?

Mr. Creighton: If this is north, sir, I am Philip Creighton of the Anglican Church.

Mr. Davis: Bill Davis from the United Church.

Mr. Ridout: John Ridout of the Anglican Church.

Mrs. Hutchinson: I am Moira Hutchinson, staffperson with the task force.

Mr. Chairman: Who will be the spokesperson or the leadoff speaker? Mr. Creighton.

Mr. Creighton: I thought I would take you through our brief. We have a couple of typos which we have to report, unfortunately.

Mr. Chairman: Excuse me, sir. For the members of the committee, that is exhibit one.

Mr. Creighton: We will give the clerk the modest revisions that are necessary, sir. I will just read our introduction.

The task force is a national ecumenical coalition which addresses questions of corporate citizenship involving such areas as social justice, human rights and community responsibility. Its membership includes the major Canadian churches, and they are

listed at the bottom of page one of our brief. Their official representatives on the task force are the links to denominational and other committees whose work includes concern for corporate social responsibility.

The members of the Taskforce on the Churches and Corporate Responsibility believe that corporations, like other institutions and individuals, have the responsibility of seeing that their endeavours do not contribute to the continuation of avoidable human misery and social injustices. This responsibility does not call for heroic sacrifice nor for unrealistic altruism in an arena of human activity in which the pursuit of economic gain plays a central role. However, it does suggest that minimum restraints must be placed upon that pursuit.

Furthermore, the obligation to consider the wider social costs and benefits of corporate activity does not stop at national boundaries. The churches, not unlike a number of major Canadian corporations, find themselves involved with many people in many countries around the world and, as a result, receive concerns expressed by partner churches overseas and local churches about the domestic and international consequences of certain corporate activities.

In a world in which economic power structures assume ever greater significance, at times exceeding those of many nation states, it is urgently important that those who exercise that economic power be reminded of the extent to which they shape and influence social conditions and social values in society. It is of concern that as corporate power increases so also do the risks that the unrestrained pursuit of economic gain will be carried out in ways that cause social injury or contribute to its continuation. The countervailing influence of competition, the searching light of publicity and the effective overview by governments are lessened as power and control grow.

Public accountability of corporations must be facilitated so that no corporation can neglect its obligation. While there is growing recognition in some business circles, as well as by the general public, that social responsibility should be an integral part of a corporation's performance, the means of calling a corporation to account are limited.

10:10 a.m.

We thought, sir, that we would speak to your committee on those areas of Bill 6 which are of significant interest to us and where we have, we think, some experience to contribute. We are going to speak to the increased openness on the part of corporations to minority shareholders and the need for greater corporate disclosures so that minority shareholders can more fully understand the nature of their investment and the desirability of an obligatory code of corporate conduct.

We would start off by congratulating the drafters of the bill on its proposal to encourage shareholder proposals. We are very pleased to see that the restriction requiring the shareholder to

have five per cent of the voting shares before being able to make a proposal has been lifted, and we welcome this change.

In our experience in making shareholder proposals at a number of meetings, we do not make them lightly, nor in the pursuit of their publicity, but in the hope of effecting actual change in the corporation's activities. Therefore, we support--this is our first recommendation, sir, on the top of page four--the proposed provision to the act allowing a shareholder, without regard to the number of shares he holds, to sponsor a shareholder resolution.

This seems to us to be a good idea, and we would hope that we could convince you to carry it on into section 98(4). That is the one that requires that to nominate a director one must have five per cent of the voting shares. We would like to see that restriction dropped also in the interests of committing the minority shareholders to enter into the life of the corporation more fully.

Our second proposal then is that we recommend that section 98(4) be amended to delete the restriction that a proposal, including nominations for the election of directors, must be supported by five per cent of the voting shares.

Following along on this line of argument, sir, we would like to see the shareholders given significantly more information about the persons that have been recommended or proposed for election to the directorate. This is information which is commonly given to the members of the various professions when they vote for their council or their directors. We think it would be helpful to the shareholders if such information should be included. We would like to see set out the qualification of the nominees and the particular contribution, relevant experience and any directorships or management positions held in other concerns, corporations or public authority.

We come to our third recommendation on the top of page five. We recommend that corporations be required to circulate the following information to shareholders concerning nominees to boards of directors: a statement from the nominator concerning the qualification of the nominee and the particular contribution the nominee can make to the board; occupation; relevant experience; any directorships and management positions held in any other corporation or public authority, and the number of shares owned directly or beneficially in any corporation.

We like the proposal that one third of the directors of an offering corporation should not be officers or employees of that corporation or its affiliates. As is probably obvious, we have the conviction that the board is the key to the corporation's ability to meet its social responsibilities and perform as a good corporate citizen.

We would like to see the independence of the board increased or strengthened. However, we would like to see that certain classes of people not be counted as independent directors. These are people who have a close connection with the corporation, such as legal

counsel, investment counsellors, bankers, consultants, retired officers et cetera.

Our fourth recommendation, in the middle of page five: We recommend that the provision of the bill that at least one third of the directors of an offering corporation shall not be officers or employees be amended by also excluding a company's legal counsel, investment counsellor, banker, consultant or retired officers as outside directors.

In development of the corporation's ability to monitor or manage its social responsibility, we would like to see the bill require the establishment of a social responsibility committee of the board of directors, such committee to be part of the standing committees of that board and it be required to report. As you see, we visualize it as being responsible for the code of ethics or code of conduct of the corporation.

Recommendation five: We recommend that boards be required to set up a permanent social responsibility committee to advise the board, to report to the board and the annual meeting on adherence to a code of ethics, and to provide an account of its activities in the annual report.

To move on to our sixth recommendation, which is restrictions on shareholders' proposals, we have a couple of concerns in this area. First of all, the bill as it stands now says that a corporation need not circulate a shareholder proposal if it clearly appears that the proposal is submitted by the shareholder primarily for the purposes of enforcing a personal claim or redressing a personal grievance or a purpose not related in any significant way to the business affairs of the corporation.

We make the assumption, which we think is probably true, that social responsibility on the part of the corporation is clearly related in a significant way to the business affairs of the corporation, so we have no particular problem with that. But where it comes from is the corporation's ability to refuse. The solutions available to the shareholder whose proposals are refused are few at this point and they involve court proceedings, or they appear to us to do so. We like to think that the shareholder, as the owner, has a right to participate in the management of the corporation. After all, it is his or her corporation in some measure. Therefore, we would like to put the onus for refusing to circulate that proposal on the corporation, on the management, and require it to show cause why it should not circulate the proposal.

We also think you might consider a different form of appeal, such as is modelled on the Securities Exchange Commission proposals or procedures. I have set that out for you at the bottom of page seven in our brief. This has the advantage that it is a consultative process rather than totally an adversarial one. It apparently has been helpful in smoothing the relationships between shareholders and management.

10:20 a.m.

I come then to our proposal six on the middle of page eight.

We recommend that sections 98(7), 98(8) and 98(9) be amended so that:

1. Where a corporation refuses to include a proposal in a management informative circular, the corporation must apply to an appeal body for permission to omit the proposal;

2. The appeal body be the Ontario Securities Commission instead of a court and that it function as does the United States Securities Exchange Commission to facilitate the inclusion of shareholder proposals in management circulars.

We are in a very negative mood, I see. Assuming that our proposal is defeated, we would like to see a proposal that managed to collect three per cent of the voting shares might be resubmitted in the following year. You can see we are trying to get the best of both worlds; we want the three per cent and we would like to keep the one that is currently in there. So we recommend--this is on the top of page nine--that section 98(5d) be amended to grant a resubmission of a shareholder proposal that has obtained at least three per cent of the vote, and that a proposal that has received less than three per cent of the vote can be resubmitted after two years, because after all it does take a fair bit of time to get up some steam in turning a corporation around.

I think it is fair to say that our experience on making shareholder proposals and in attending a great many annual meetings at which we attempted to raise questions which probably were not well received by the management, has been that there really is not any significant number of proposals--in fact I think we know of none--that are clearly there for the purposes of causing difficulties.

Turning to our page 10, on corporate disclosure, this comes out of our concern that the information which we think is necessary for the shareholders to inquire into the effective performance of corporate social responsibility is not now necessarily required. I will go into it in detail, but what we are proposing here is really not such as to be extravagantly new or unusual. Much of it is perhaps available in some other form, but we would like to see it put together in a nice, neat package in the annual report.

There is some developing interest in the corporation's social performance, because it appears from the studies that there may be some relationship between the corporate social performance and the corporate financial performance over the long term. We would like to see this material required of every corporation, because it seems to us this would get around the problem of the competitive disadvantage that some corporations may feel if they supply individually this kind of information.

I would just like to draw your attention to the list of suggestions at the bottom of page 11 and the top of page 12. These would include, at the bottom of page 11, "(a) all other directorships and management positions held by each director and officer in any other corporation or public authority." Certainly our leading Canadian corporations include this in their annual report as a matter of course.

We would like to know, "(b) the 20 largest beneficial holders of voting shares in a corporation; (c) the number of shares owned directly or beneficially in any one corporation by each director or officer of the corporation"--again this is information which is available, but not in the annual report or not commonly; "(d) subsidiaries, domestic and foreign, and companies over which, through partial ownership, significant influence is exercised"--again this is good practice when the annual report gives this information.

I think (e) is probably a relatively new request, "public or private military contracts in Canada and abroad; (f) financial or other contributions or gifts made to political parties, individual politicians and civil servants in Canada and abroad; (g) government support received, including government grants,"--which would now be typically set out as a separate item in the financial statements, but the other things here would not, that is, the soft parts of the government support--"export guarantees and export insurance arrangements; (h) contracts with the Canadian federal or provincial governments or their agencies"--and here, since the segmented recording requirement of the chartered accountants went in, you are starting to see some evidence of that, but we would like perhaps to see this strengthened, and "(i) major project developments or closures affecting local communities"--signalled perhaps a little farther ahead than they are.

This is our recommendation eight: "The churches therefore recommend that the bill provide for uniform public disclosure requirements in the annual report on items listed on pages 11 and 12 of relevance in assessing the social responsibility of a corporation." We appreciate that what constitutes generally accepted accounting principles are going to be established by regulation under the act, but we felt we should make our pitch at this time.

Our final recommendation relates to a code of corporate conduct. This is on page 13 and on. Again, while we would find this a very attractive document to exist, it would be very useful for us in trying to establish whether or not the individual corporation had behaved the way it said it was supposed to behave. There are some number of them established by the leading corporations in Canada. The Adams report of the Canadian Institute of Chartered Accountants, the special committee to examine the role of the auditor, suggested this. We would like to support its conclusions.

We don't think the government is the body suitable to do this because, after all, corporations have to behave in ways which are suitable to their owners and to their management. We doubt whether every corporation will want to behave in the same way or even whether if it is appropriate that they should. It doesn't seem to us that such control over the corporation is likely to be possible. Therefore, we would like to suggest that the boards of the individual corporations be required to establish their own code of conduct. We would like to make it specific enough that the individual employee or manager of the corporation would have no difficulty as to what he or she should do in the individual case,

but also general enough that the reader from the outside would have some concept as to how the corporation proposed that it should operate.

10:30 a.m.

On pages 14 and 15 we have set out some of the things which we feel the code should address itself to, such as employment practices, quality standards, purchasing, transfer pricing, pollution, community relations, improper payments, conflict of interest and human rights.

So finally, then, our last recommendation, on the bottom of page 15: "We recommend the Business Corporations Act of the province of Ontario be amended to include a requirement that corporations establish a shareholder-approved code of conduct and that an annual report be made to the board and the annual meeting of shareholders on the corporation's adherence to the code. Such a code of conduct would include the corporation's intentions in regard to the items listed on pages 14 and 15."

That is our submission, Mr. Chairman.

Mr. Chairman: Thank you very much, Mr. Creighton. Questions, statements?

Mr. Breithaupt: Mr. Chairman, perhaps we might be allowed a few comments with respect to the presentation.

Mr. Renwick: Mr. Chairman, perhaps Mr. Breithaupt would just allow me to interrupt so we that we could decide how we would proceed.

I would hope we could take each recommendation, one after the other, and not only have the opportunity for each of us who wants to to comment on that particular recommendation but also to have the benefit of the ministry's views on the particular topic. That might be a somewhat more orderly way than just a discursive way of dealing with it.

Mr. Breithaupt: It so happens that that is what I was going to suggest, Mr. Chairman: that we have the opportunity of reviewing these with the comments made from the ministry. Certainly it is quite clear that the proposals and the nine recommendations that have been made are quite straightforward in what they hope to achieve. I think what we would want to hear from the ministry is why these recommendations either are acceptable or unacceptable.

Mr. Chairman: From that point of view, shall we then start with recommendation one on page four? Is there anyone who wishes to--it is probably a less contentious one than the others. That is a support of this group, the task force, for the proposed legislation.

Mr. Breithaupt: There is certainly no question about that.

Mr. Chairman: Are there any comments which the ministry or anyone else wishes to make on that?

Mr. Mitchell: I will have Mr. Howard or Mr. Wells, whoever wishes to, respond from the ministry's point of view.

Mr. Howard: No response is required.

Mr. Renwick: I have a response in the sense that I happen to be in favour of it. I am interested to know what the discussions were or why the ministry decided to drop the requirement. As I say, I am in favour of it but I am always interested to know how the ministry gets to the point where it makes a progressive move as distinct from a regressive move.

Interjections.

Mr. Howard: As I said before, Mr. Renwick--and I am beginning to sound like a broken record--we are tracking the Canada Business Corporations Act. The various drafts that we have prepared have been submitted to the hard-working committee of the Canadian Bar Association, the Institute of Chartered Accountants of Ontario and the committee of the Board of Trade of Metropolitan Toronto, which is made up of practising lawyers and accountants.

I am looking at my notes with respect to shareholders' proposals. The Board of Trade of Metropolitan Toronto objects to any shareholder being able to require the directors to put a proposal to a meeting. It is argued that this would waste management's time because there would probably be a proliferation of requests.

This provision has been in the Canada Business Corporations Act since December 1975. There has been no evidence that there is an unusual burden placed on management by this requirement. So on the advice of our committee that works with us we put in--and I think it is practically word for word--section 131 of the Canada Business Corporations Act.

There is no requirement there with respect to the five per cent. There is the five per cent holding to entitle a person or a shareholder to nominate a director. I think this is a very wise limitation on the shareholders' privileges, or else the board of trade would certainly have something to be concerned, about because there would be perhaps a proliferation of frivolous nominations. We have all heard of One-share Sweeney. In every generation there is a One-share Sweeney.

Mr. Renwick: It all depends where you sit. He actually provided an immense stimulus, even though he was a figure of fun to a lot of people who wanted to denigrate him. One-share Sweeney probably created a one-man revolution with respect to the requirements of disclosure in the United States and indeed we had one in Canada who performed a similar useful function.

I think it depends where you sit as to whether you like them or whether what they say is frivolous or not.

Mr. Howard: But certainly I would not recommend that

98(4) be amended to delete the five per cent requirement for nomination of directors.

Mr. Chairman: Excuse me, may I get direction from the committee on this? Yesterday we did seek the assistance of Mr. Hebb on various points that were in connections with other presentations, of people such as the board of trade and the Ariadne Group. Do we wish also Mr. Hebb's assistance and comments with regard to this presentation or presentation of other groups as we go along?

Mr. Elston: I think we should consider these (inaudible) far more organized if they could be incorporated later into other discussions--

Mr. Chairman: Yes, and Mr. Hebb add in his comments as we go on to the task force's--in that way we are mixing presentations.

Mr. Elston: I think we would be better to consider this by itself. (Inaudible) reactions could be made better, I think.

Mr. Chairman: Yes, when you complete the CPA's presentation.

Mr. Breithaupt: Mr. Chairman, one advantage of having a brief comment perhaps made on a certain point might be to stimulate discussion and in the presence of both of the groups here rather than doing it separately. I suppose if there was a brief comment to be made as to why a certain point was good, bad or indifferent it might help us, but we wouldn't want to get bogged down in lengthy presentations.

Mr. Spensieri: The other comment, Mr. Chairman, if I may, is that most of these recommendations are of a policy nature. It would be nice to see how they fit in from a technical standpoint and how they would operate in practice. It is very nice to make all of these wonderful policy generalizations but I think sooner or later it has to be reconciled with the practical, technical aspect of the act, where I think Mr. Hebb would be particularly helpful.

Mr. Chairman: Fine. Is that the consensus? Mr. Renwick is that--it is a certain mixing of the different witnesses. Mr. Hebb, would you come up please to one of the microphones? It is a little bit irregular to mix the representatives.

Mr. Hebb: This is a very brief comment. It will be even briefer than the discussion about having me on the agenda. I just wanted to add to Mr. Howard's general comments that this provision has been taken from the Canada Business Corporations Act. A primary inspiration for this provision is uniformity--a recognition that the federal provision represents a new and generally recognized progressive approach on shareholders' rights and that Ontario should move ahead and provide the same rights as Ottawa is providing.

10:40 a.m.

I just wanted to add--and this could be overlooked--that

there are two additional rights shareholders do have in connection with the nomination of directors. First, there is the right, which I appreciate is generally a more ritualistic right, to nominate from the floor and that is specifically identified in section 98(4). That right is not taken away.

What we have been talking about is the right of antimanagement groups to use management proxy materials to support their own nominees. As I say, there is the right to make nominations from the floor. In addition, there is the right of nonmanagement people to prepare and circulate their own proxy material. I appreciate that is expensive, but that right is available. They can prepare their own proxy material, get a shareholders' list and send it out to the shareholders.

So there are those two other important shareholder rights that you have to keep in mind when you criticize or consider the propriety of the five per cent limit in connection with using management's proxy materials. That is what we are talking about, management's proxy materials.

Mr. Ridout: With respect, Mr. Chairman, it is really not management's proxy materials, it is the company's proxy materials that are sent out at the expense of the company. It seems to me that it should be the right of the shareholder, who is an owner of the company, to have material inserted in the proxy material that his company is sending out to the other shareholders.

Mr. MacQuarrie: Before we leave section 98, 98(1)(a) provides that a shareholder may submit to the corporation notice of a proposal, and then (b)--I am having some trouble.

Mr. Chairman: With the "and"?

Mr. MacQuarrie: Yes.

Mr. Chairman: That was brought up yesterday and it was decided to leave that for the clause by clause. You are not alone in your problems there.

Mr. MacQuarrie: I can just picture an annual meeting and points of order being read.

Mr. Mitchell: Mr. MacQuarrie, it was agreed yesterday that in clause by clause we would examine the "and" and the possibility of "and/or" and so on.

Mr. MacQuarrie: Sorry, I missed yesterday.

Mr. Chairman: You got snowed in with Messrs. Laughren and Gordon.

Mr. Spensieri: One last point on 98(4). If the intervener is suggesting that we remove the five per cent requirement, would you go one step further and perhaps suggest that if the objective is to ensure the nomination of a director who is not likely to be supported by the rest, you might also favour the practice of sort of plumping the ballot and allowing all the votes of those

supporting shareholders for a certain number of directors to be applied to that one director?

It seems to me that if you are suggesting a mechanism for allowing a nonpopular director, you should go one step further. Say a person who does not like any kind of chemicals being produced wants to run for a directorship of Dow Chemical, if they are going to elect 10 directors you should be able to use all the votes on that one particular director. Would you also favour that--

Mr. Breithaupt: So if you have a tenth of the shares, in effect, you will have a directorate.

Mr. Spensieri: Yes.

Mr. Davis: The proposal being suggested is called cumulative voting. It is not one that is in our brief and it is not one that the churches have dealt with in any significant way, so I don't think we would want to change the brief in that direction. The four of us sitting here at this time do not have that authority.

Mr. Spensieri: But as a general policy?

Mr. Davis: It is not one we really wrestled through.

Mrs. Hutchinson: I am not sure it is fair to make the assumption that we want to see shareholders have a greater possibility of making nominations to the board only to get antimanagement or unpopular people on the board. It could be assumed that we are interested in presenting to the shareholders and to the attention of the management a wider diversity of people who might make good directors on the board.

Mr. Spensieri: Surely you don't want it to be an exercise in futility. You want it to have some chance of success.

Mrs. Hutchinson: It would be nice if it had some chance of success, but even if it were not successful it seems to me it could be useful in terms of making people think more about what the role of the board of directors is and the qualities of the people who are at present on the board.

Mr. Ridout: It might have been helpful to the banks, for instance, if their shareholders had had an opportunity to nominate women to their boards when they were searching for women. I am sure the shareholders probably could have picked some ladies who would have been appropriate, despite the problems the chairman of the bank had.

Mr. Chairman: Mr. Spensieri, cumulative voting is still in there, if you are leaving. It is still in this new act, the four directors.

Are there any other questions or comments dealing with regard to recommendations one or two, which both deal with section 98?

Mr. Renwick: On recommendation one, perhaps I did not put my question to the ministry officials as well as I should have. I

simply wanted to know, apart from the uniformity argument, did the ministry itself with respect to Ontario corporations have any response or demand from the public or any indication that there was concern about the higher restriction?

Mr. Howard: No.

Mr. Renwick: So the compelling argument from your point of view is strictly the uniformity one?

Mr. Howard: There are no problems that I was aware of.

Mr. Renwick: I am curious about the restriction that a proposal may not include the nomination for election of directors unless it meets the five per cent requirement. I understand the distinctions that Mr. Hebb made, and I appreciate them, with respect to nominations from the floor and the capacity of any shareholder to send out any material that he wishes to send out to the other shareholders.

The point as I understand it has something to do with being frivolous. The frivolity of it, if that is what it is to be called, is certainly not prohibited because any number of people could be nominated from the floor, presumably. So if there were 10 people holding one share, each of them could nominate a slate or any number of directors from the floor.

Mr. Howard: But these other nominations would go out with the proxy information material, the proxy solicitation; that means management's information circular and any dissident's information circular. All this is spelled out in section 111.

Mr. Renwick: So we are not really speaking about disruption of meetings because a planned disruption of a meeting could of course take place. I am not speaking in approval or disapproval of disruption of public meetings of public companies. All I am saying is the disruption argument is not a valid one and has nothing to do with this.

The argument that a proposal should be subject to this higher requirement, if it is to be a nomination of a director or directors, seems to me to fall to the ground--and we will come to the further recommendation--in the sense that if information with respect to persons nominated as directors, their background and experience and so on, is sent out along with the information that goes to the shareholders in any event, I think you can leave it to the shareholders as to whether or not they are going to respond by sending in their proxies with respect to directors.

I am curious about whether I am right or wrong that the argument strikes me as somewhat specious to have gone this further step and yet to still hang on without any what to me is not a very clear reason to this particular limitation about the five per cent share requirement. I would appreciate it if any of my colleagues on the committee want to address that particular point because it seems to me that information permits shareholders to make whatever decisions they wish to make when they send in their proxies.

10:50 a.m.

Mr. Howard: But if a nomination to the board of directors is worth while and carefully thought out, it is no onerous requirement that it be supported at the outset by a minimum of five per cent of the voting shares. As Mr. Hebb pointed out, it is not the end of the situation because any nominations could be made from the floor and any shareholder can indicate in his proxy someone other than the management nominees.

Mr. Renwick: But you put a shareholder in a very invidious position when you prohibit him or cut down his right to circularize the shareholders. I recognize he could do it on his own, but the expense is extremely difficult and the status of it, that is the neutrality of the information, is destroyed if it becomes a matter of separate solicitation.

It still strikes me as strange that we should be asked here in this bill to say to a shareholder, "You can nominate from the floor, but you cannot solicit proxies in advance for a person you think is a worthwhile nominee to the board of the company." It seems to me that what you are saying to the shareholder is, "We do not really give you the respect that you are entitled to get, because we require you to round up others to indicate that your judgement is a valid judgement as to the eligibility of a particular person to be a member of the board."

I am very concerned that the tracking of the Canada Business Corporations Act and the uniformity argument is going to inhibit us in this committee from making progressive advances, and I would consider it would be a progressive advance if that limitation included in section 98(4) were deleted from the act. That would perhaps stimulate those responsible for the Canada Business Corporation Act to emulate Ontario. We would be taking, as usual, as we have tried to take over many years, a forward position, so that the federal government could copy our initiatives. I would certainly appreciate any support or comment from any of my colleagues on the committee to that proposal.

Mr. Howard: Mr. Renwick, this whole proposal, or this whole section 98 on shareholders' proposals is a progressive and fresh step in Ontario, giving the shareholders a privilege which heretofore they have not had in the Ontario Business Corporations Act. At this stage, having taken this progressive step, and it is endorsed by government, I would be reluctant to recommend any changes in section 98 as it is presently drafted.

The experience in Canada has not indicated that subsection 4, with that five per cent requirement for the nomination of directors, be repealed. Mr. Hebb, are you aware of any problems with subsection 4? I turn to Mr. Hebb because he has the experience of active practice whereas I have been sitting for the last few years in government service, so I am not dealing with clients who are incorporated.

To just wind up what I was saying, you may be right, Mr. Renwick, but I know that there are a good many lawyers, our

colleagues downtown, who would be very opposed to what you are suggesting; witness the board of trade which opposed the whole section 98 initially. We finally got them around to our way of thinking. That committee is comprised of lawyers and accountants.

Mr. Chairman: There was a question addressed to Mr. Hebb so perhaps you would walk by a microphone to answer one way or the other rather than leave it hanging.

Mr. Hebb: I think the best thing I can say is it is strictly a policy issue. I think the matter has been debated quite well by the committee. It is fair to say the most significant input the shareholders have into the way a company is run is through the election of directors because the statutes make it very clear that the basic responsibility for running companies is vested in the board of directors. Shareholders get consulted on fundamental changes but the basic responsibility for running the company is that of the directors. Accordingly, the main remedy of an unhappy shareholder is to throw out the board. This is very key and I think you have to have that in mind in terms of your policy considerations.

In answer to Mr. Howard's question, the other statutes operate in the same fashion as does this proposed provision and as does the Canada Business Corporations Act. This would be a significant change but it could be justified on a policy basis should you wish to make a change. From a management point of view, they would be concerned that they would have a flood of nominees and you would have proxy circulars that would look like telephone books with page after page of nominees. All you would have to do would be to send in the name of the person you wanted in the proxy circular, whereas, if we are talking about a more conventional proposal, that takes some time and thought in terms of developing it, presenting it and justifying it and so on.

I think it is the policy issue that you have to consider. You would certainly be innovating significantly were you to remove the five per cent provision.

Mr. Spensieri: Have the ministry and their advisers considered the possibility that a proponent who makes a proposal could include information about himself or herself in that circular then be nominated by the floor and achieve, in effect, the same objective of having circularized their particular position, using management circulars and achieve an effect indirectly through the back door, the same type of objective our intervenor is suggesting?

Mr Howard: It isn't contemplated.

Mr. Spensieri: Would that be technically possible, Mr. Hebb?

Mr. Hebb: If I understand your point, you are saying would the management proxy material contain information about the qualifications of the nominees?

Mr. Spensieri: I am saying a proposal is not bound by any share restriction, so any one person, regardless of the number of

shares, can make a proposal. As part of the proposal he or she would then include information regarding his or her qualification for directorship.

Then at the public meeting there would be a nomination from the floor, assuming that this clause stays the way it is, and in effect you have achieved the same objective.

Mr. Hebb: Yes, but I don't see how that differs from what we have been talking about. The concern of opponents of removal of the five per cent limitation would be that management would be flooded with nomination after nomination and everybody would have 10 or 15 lines of qualifications to go in the proxy circular and so on, and you would end up with a telephone book.

Mr. Spensieri: I really thought the main issue here was whether you get on the bus or not, whether you get on the management circular bus or whether you have to circularize your own.

Mr. Hebb: That is right.

Mr. Spensieri: And I think you can still achieve the same thing.

11 a.m.

Mrs. Hutchinson: I don't think you can, because the management could simply turn down that proposal as the legislation stands.

Mr. Spensieri: They can?

Mrs. Hutchinson: Yes. Right now as the legislation stands, the management can turn down a proposal and it is up to the shareholders to go to court to force management to send out that proposal. We will deal with that later on as we continue going through this.

Mr. Breithaupt: Which would effectively be too late in practical purposes for planning for an annual meeting one would expect.

Mrs. Hutchinson: I am not sure what the timing is.

Mr. Hebb: Mr. Chairman, I guess to put it another way, when we are looking at proposals other than the nomination of directors, there are some significant limitations built into the statute against the company being flooded with points that are not useful for shareholder consideration. The principal point is the one I mentioned a moment ago, that shareholders are only entitled to deal with certain matters, but the fundamental responsibility for running the company is that of the directors. That is a major constraint in terms of what shareholders are able to do with the other kinds of proposals and that stems from the fundamental approach of the corporations law.

If we were to go the same way with directors, I guess the question in my mind would be what sort of constraints would you

develop in order to ensure that the nominations of directors would be bona fide. Are there any constraints that you could conceive that would provide management with some protection against being overwhelmed with people who wanted some free publicity and really were not very serious about what they wanted to do with the company?

Mrs. Hutchinson: I understand from what Mr. Howard said that when the five per cent restriction was dropped, there was concern that there might be a flood of shareholder proposals and that has not happened. Is there any reason to think that there is going to be a flood of nominations if you drop the five per cent proposal restriction matter? I just don't understand why there is any assumption that there would be a flood of nominations.

Mr. Hebb: That is the point I have been trying to make. As I say, it stems from the fact that most of the things the corporation does are in the province of the board. The shareholders only get involved in fundamental changes; therefore, the scope for shareholder proposals under the present law is quite limited.

What we are now talking about is to open up the one area that is really most important to the shareholders at an annual meeting, namely nominating the directors. We are talking about opening it up completely so that any shareholder could write into the company and say, "I want to nominate X, Y and Z" and give three lines of material about them. I just think there is quite a difference between the likelihood of proposals being submitted to management under the present law with respect to nondirector-type proposals and with respect to director proposals.

This is the point I have been trying to make for the last few minutes. You may not agree, but I see quite a difference in terms of the two types of situations, in view of the fact that with the nondirector proposals the potential there is quite limited in terms of the law. In the director proposals, this is where the shareholder is king. This is what he comes to the annual meeting to do, to elect the directors, and we are opening that thing up completely without any constraints.

Mr. Renwick: Mr. Chairman, I think you obviously will come back to this point when we come to recommendation number three, but in wanting to put to my colleagues on the committee the need for us to seriously consider eliminating that limitation with respect to the election of directors, I think it must be accompanied perhaps by a two-tiered method of ensuring that it is not abused. I think perhaps the second tier of the protection against it being abused has to do with the content of section 98(5)(b). Not necessarily those words, but in some way which indicates that a company could if it wished simply say, "No, we are not going to submit these names to it," and leave the shareholder the recourse that is provided either in this bill or that has been recommended by the delegation that is in front of us this morning.

The second area relates to the third recommendation, and we can come back to that again, that is, the provision of a statement from the nominator concerning the qualifications of a proposed nominee and why he should be one. It seems to me that that kind of basic information is such that the other shareholders in the

company, when they receive information, are going to be able to make their own judgement with respect to the background and experience of the persons concerned. It would be possible for us to eliminate this five per cent requirement and build into the statute the kinds of cautionary methods which would prohibit abuse, or at least provide avenues by which abuse could be prevented.

Mrs. Hutchinson: We have not talked about this, but I would suggest there must be creative ways of thinking of limitations on possible abuse. One would be to have nominations perhaps screened by the outside directors on the board, or some such system as that. There must be ways of doing it if the possibility for abuse is as great as has been suggested.

Mr. Chairman: Shall we pass on that? The first three recommendations are all centred on section 98.

Mr. Mitchell: Mr. Chairman, I would suggest to you that recommendation three appears to me to be perhaps covered in section 111. I stand to be corrected on that. Perhaps, briefly, Mr. Howard might want to comment on recommendation three.

Mr. Howard: Mr. Chairman and members, you do understand, of course, that the proxy solicitation must be accompanied by a management information circular in prescribed form--this is section 111--and that prescribed form, the one currently in the regulations under "Canada," requires very extensive and detailed information with respect to the affairs of the corporation and the directors who are nominated by management to the board. Also, there is provision for a dissident's information circular in prescribed form, and under Canada regulations the information required there is quite detailed.

In drafting our regulations, we will have regard to the regulations under the Canada act and to the regulations under the Securities Act where an information circular is required. It is my recollection that the Canada information circular, or proxy circular as they call it, is primarily based on the information circular developed under the Securities Act and regulations.

Mr. Chairman: Can we carry on with recommendation number four, Mr. Mitchell?

Mr. Mitchell: Mr. Chairman, with respect to item four, I am not a lawyer but if one reads section 114(3) it says "shall not be officers or employees." In fact, the recommendation here talks about excluding, as well, "a company's legal counsel, investment counsellor, banker, consultants or retired officers." Three or four of those--legal counsel, investment counsellor and consultants--would, in my opinion, be rated as employees and, as such, would be covered by section 114(3). Perhaps Mr. Howard would like to comment further.

11:10 a.m.

Mr. Howard: In an earlier draft of this bill--I cannot remember the exact words--professional advisers were excluded. I think those were the words we used. After it was reviewed and we

received comments from the various interested groups and individuals, we came up with the words you see there now in section 114(3) to meet the objections from the bar and the board of trade which were concerned about corporations in Ontario.

Mr. Chairman: In most cases would not the legal counsel, investment counsellor, consultants and so on be independent contractors rather than employees? I would hate to think most of the bar of Ontario would become employees.

Mr. Mitchell: As I said, I am not a lawyer, Mr. Chairman.

Mr. Chairman: That was a facetious aside, Mr. Mitchell.

Mr. Renwick: I have a question and a comment. My question simply is what did the original draft that was circulated show, Mr. Howard--not the one that was originally introduced in the House, but the original draft? In other words, has this gone through a process of change, and what was the ministry's first position on this question?

Mr. Howard: I can't recall the exact words, but the effect was to exclude professional advisers from membership on the board of directors.

Mr. Renwick: Similar to the way it is done in the definition of an insider as a person retained by a corporation as an insider. Was it intended to exclude that kind of person, the professional?

Mr. Howard: It would exclude anyone who would be under the influence of management, looking to management for substantial fees as an investment counsellor, legal adviser, accountant or auditor.

Mr. Renwick: What were the interests expressed to the ministry that led the ministry to change its views with respect to this to provide a less protective provision?

Mr. Howard: There was widespread objection.

Mr. Renwick: What were the reasons given?

Mr. Howard: I can't recall the reasons at this late stage, Mr. Renwick.

Mr. Renwick: I thought the distinction made yesterday and being made here again today between outside directors and independent directors was one we should direct our attention to. In the case of a person retained by a corporation, I suppose the classic term that refers to professional advisers of a corporation is used in the insider definition, so that a person who is on a professional retainer basis with a corporation is an insider for the purposes of part IX of our bill and of the Securities Act. It does seem to me that recognizes the fundamental involved interest which would disqualify such a person from ranking as something called an outside director.

I must say it gives me some concern that, without going the whole stage of the step towards independent directors, we should at least exclude the professional advisers of corporations in this bill, whatever the language may be or however it is expressed. The obvious simple way would be to add the words "or retained by" in section 114 to have it read, "at least one third of the directors shall not be officers or employees of or persons retained by the corporation or any of its affiliates."

That would be a shorthand way of accomplishing it if it is adequate for insider purposes. It at least would raise the question that the professional advisers in the broad sense of that term would be disqualified from this particular protective provision. In the absense of reasons being expressed very clearly, I cannot accept the argument that there have simply been objections to it. It would not matter if you changed a comma in the Business Corporations Act; there would still be some objections to that.

Mr. Chairman: Mr. Hebb, can you add to that?

Mr. Hebb: I think I can say a bit about the history of the question you are raising, Mr. Renwick. I believe the phrase in the first draft was, as Mr. Howard indicated, "professional adviser." Our bar association committee felt that if it were to remain with the prior definition, it was too general. What came within professional and what did not? There are certain well-recognized professions and there are a lot of other areas of occupation where there might be disagreement as to whether they are normally considered a profession or not.

Another concern was that if you did a minor transaction of \$200 in the course of a year, as opposed to legal fees of \$20,000, whether you should be caught in those circumstances. A further question mark was why just pick on professionals? I guess it was pretty easy for a lawyers' group to be concerned about this, but there are all kinds of other people, like businessmen, who have contractual business relationships with the corporation, and they could be major. Why aren't they precluded?

The philosophy of the act, as you know--and it has been that for many years--is to require directors who have business relationships with the corporation to declare their conflicts of interest at the time that business transactions that involve them are being considered by the board and, further, to refrain from voting on those matters. That sort of provision is contained in this bill, as it has been continued in other statutes, the predecessor statute and in other statutes.

Faced with the difficulty of this issue, we perhaps took the easy way out, but we said to the ministry, "We think you have got to examine this in a much more comprehensive way, and unless you do that, we think you had better back off this professional adviser thing." I think it is fair to say that people on our committee, as does the general community, recognize that there is a conflict of interest if, say, a lawyer sits on the board and does work for the company. There is no question there is a conflict of interest.

The next question is, how do you go about legislating it? I

guess that is the issue we are faced with today. I just want to make it very clear that I do not see it as an easy thing to do from a drafting point of view. Even if you have decided that professional advisers are much more pernicious than businessmen who have contractual relationships with the company, even if you decide that from a policy point of view, I do not think it is an easy drafting job. I do not think specifically putting in "professional adviser" is going to solve your problem.

Mr. Ridout: The proposal is not to preclude those people from being directors; it is only that they not be counted in the one third. There would still be room for legal advisers and whatever else the board of directors wanted to have as membership. It is only that we are interested in seeing that one third of the directors are truly independent, and we believe the description we have laid out here would get around the problem of using professional advisers because it specifies the actual people that we think should not be counted in the independent advisers.

Mr. MacQuarrie: On this, if we take the word "banker," would that mean the manager of the bank with which the firm does business or any other officer of that bank?

Mr. Spensieri: Or any bank.

Mr. MacQuarrie: Could it mean a director of that bank who is also sitting as a director of the corporation? What does that word "banker" mean?

11:20 a.m.

Mr. Ridout: Are you asking me?

Mr. MacQuarrie: This is the sort of situation you run into in day-to-day hearings with corporations. A firm might be doing business with a particular bank and a particular bank manager, but also you could see sitting on the board of directors of that firm a person who is a director of the bank or else a person from the head office of that bank. Or any bank.

Mr. Ridout: We are suggesting that person not be counted in the one third. He could still sit on the board.

Mr. MacQuarrie: I have some trouble classifying that person as an insider, in my mind. It is the same with a retired officer who has technically severed his ties with the firm, except possibly the pension. He has emotional ties and certain possible loyalties to the firm and so on, but no direct financial interest in the firm, apart from its success in terms of providing his pension.

Mr. Ridout: We are not trying to preclude people with financial interests, but to get one third of the board of directors independent of management so they can represent more truly the shareholders.

Mr. MacQuarrie: Would a retired officer of a company not be independent of management?

Mr. Breithaupt: It depends on the pension plan.

Mr. Ridout: It depends, I guess, on how long ago he retired, but he can be in that two thirds. There is lots of room for him to be in the two thirds.

Mr. MacQuarrie: Mr. Renwick used a description earlier relating to consultants who were actually providing services to the corporation apart from sitting as directors. But some of these people you have listed here are not providing any service or entering into any contract or arrangement with the firm whatsoever. They are the type of people who could be very valuable directors. You say they could fit into the two thirds, but, from my point of view, there are a lot of outsiders.

Mr. Chairman: Ladies and gentlemen, might we move on? We do have some time constraints. That has certainly opened up our thinking and it will be discussed much more in the clause by clause. Could we go on to recommendation five, which appears to be a new topic? May the chair observe that perhaps recommendations six and seven also deal with section 98, which we have previously dealt with. Does the committee think we have dealt enough with section 98? We did generally restrict our questions and comments to the first four subsections thereof.

Mr. Breithaupt: Why don't we take a moment and complete items six and seven so we have this theme out of the way?

Mr. Chairman: Yes, I think that would be wise. So will we skip to recommendations six and seven and then go back to five, which is a new topic?

Mr. Breithaupt: Yes, let's do that, Mr. Chairman.

Mr. Chairman: Again, we are on the question of the proposal and I suppose the enforcement, for want of a better term, portion of section 98.

Mr. Breithaupt: I would like to hear from Mr. Howard in regard to the suggestion with respect to using the Ontario Securities Commission as the appeal body rather than courts. There might be some administrative ease in doing that, perhaps not only a saving of some costs, but an opportunity for a somewhat more prompt decision in areas where a delay in the opportunity for having a proposal being distributed would really lose the effect of that proposal, because of an annual meeting that was already planned. Could we hear an explanation with respect to the present situation with the securities commission, if we know what that procedure is, and why or why not that might be appropriate in the suggestion made under recommendation six?

Mr. Howard: It has been my experience in working with the preparation of this bill that where we have brought in the commission, where the commission hasn't previously been involved in the Ontario Business Corporations Act, I have met resistance because, as you all know, we are under considerable constraint. Everything we refer to the commission puts an extra burden on the

resources it has, which are becoming more and more limited.

Generally, with respect to the brief and the recommendations put before us, I find them all very refreshing. But as I have pointed out to others who submitted briefs yesterday, after this bill becomes law, we are establishing a mechanism whereby the public who feel there should be amendments to the bill will be able to submit them to the ministry. The ministry, in turn, will be submitting them to a committee of the bar for review and further recommendations. You are not alone in your new departures, which I find very interesting, very refreshing, but we know that shortly after this becomes law, we are going to have to deal with the elimination of the share certificate, which is going to involve radical amendments to the bill before us. But we cannot deal with that now. So if that is any comfort to you--

Mr. Breithaupt: It certainly is an explanation of how some of this has developed. I don't think my comfort index has changed all that much, but--

Mr. Howard: I didn't mean to comfort you, Mr. Breithaupt, but the companies sitting behind you. It is not futile.

Mrs. Hutchinson: But our suggestion does involve a change in principle, not just in switching from a court to the securities commission. It changes the principle of the onus being on the corporation rather than on the shareholder to dispute whether a proposal can go forward, and I would assume that is the kind of principle that needs to be dealt with at the legislative stage.

Mr. Howard: It's the type of principle we would like to--if I may use the expression--bounce off the gentlemen of the bar who are in practice and have to deal with these matters for their clients. It is not just your group that is involved. There are other aspects and other parts of the community that have an interest in what you are proposing. You may be a minority of one. You may find you have a majority of support. Only time will tell. But what you have put forward is new to us in some aspects, except yesterday someone in his brief, I think, dealt with this social accountability idea.

Mr. Breithaupt: Yes, Mr. Waitzer did yesterday.

Mr. Howard: Mr. Waitzer, yes. And at the moment the only required committee under the bill is the audit committee. The bill permits the board directors to establish other committees, but in the bill we don't specify what types of committees they shall establish.

Mr. Breithaupt: We don't preclude any?

Mr. Howard: No, we don't preclude any.

Ms. Hutchinson: If we want to put forward this proposal then, will we be notified at a later stage when it is appropriate to do so?

Mr. Howard: You can put forward a proposal at any time.

All I am saying at this stage is I will not be in a position to recommend your completely new departure to the minister. But I will in the future when we have established this technique for review of the bill and hearing recommendations for change, because nothing is perfect in this world, as you know. Mr. Renwick and Mr. Breithaupt when they developed the bill in their select committee in 1967, which resulted in the present Ontario Business Corporations Act, probably thought they had something that would not require change for a long time.

11:30 a.m.

Mr. Renwick: I won't make any comment about that. On this, I think the alternative model should be seriously considered by the committee. Between now and the time we deal with it, we should seriously consider the alternative. It is not a drastic proposal to suggest that, in this day and age, it is appropriate to move away from the courts and to move to the securities commission, which is knowledgeable on a day-to-day basis about the corporate activities of the world. And we are talking mainly about companies that are offering corporations.

I think we must remember that the term "court" here is defined as the High Court of Justice, and the High Court of Justice is clogged up now. It does mean that whenever you get any matters that have a time urgency about them, the court has to make a place in its docket to hear it within the appropriate time. If you are dealing with a shareholders' meeting that has been called to be held on such-and-such a date, or is planned to be held, then they have got to make room on the docket. That means that other people who are in front of the court get pushed back further in the court delays, and I am quite certain that tomorrow, when the judges open the courts, you will hear from the chief justices about the state of the clogging of the courts. That is one very good reason.

A second is that there is no question whatsoever that, whether we like it or not, the procedures in the High Court of Justice are very expensive. I do not think you should kid yourselves there is some cheap course of obtaining justice. There is not any more. Any lawyer in this room would tell you that for such a proposal to appear in the High Court of Justice, to retain counsel to appear, you are talking before you start of a lot of dollars. So that is a significant impediment to the avenue ever being used.

I would assume that, even in this day and age, in terms of the securities commission, with the number of commissioners and its capacity to appoint one commissioner to hear particular matters, as distinct from the whole commission or from a panel of commissioners, there is ample leeway for this kind of question to go to the securities commission for consideration. The people there live in this world from day to day; they understand what the implications are. I think it would be a much more expeditious forum, and I think it would also be a significantly less expensive forum.

It would be particularly less expensive if the person concerned wanted to exercise his own individual right to appear and

make his submission, which he would not be able to do, for all practical purposes, at the High Court of Justice. We do provide elsewhere in the bill for the use of the commission, as a facility available for appeal from the directors--I thought we dealt with one yesterday, Mr. Howard.

Mr. Howard: Not for appeal from the directors to the commission; appeal from the directors to the court.

Mr. Renwick: I thought there was a case in connection with the audit question that went to the commission.

Mr. Howard: There are certain areas where the commission will bring an application to the court at the request of--

Mr. Renwick: Is there not a role in here for the commission? I must have misread something.

Mr. Howard: There is a role in here for the commission, but not in this particular aspect. In the going private situation there is a role for the commission. That is in 88 or 87.

Mr. Renwick: I don't think I am hearing you correctly. I thought that yesterday we dealt with the auditor question and your discretion as director.

Mr. Howard: But the commission is not involved there at all.

Mr. Renwick: Has there not been, from that decision--what was that section?

Mr. Howard: Section 147.

Mr. Renwick: I thought, in the course of that, there was some proposal. The commission is not involved in this act?

Mr. Howard: No. All the financial information is filed with the commission.

Mr. Renwick: Then I will have to withdraw that comment. I thought that in one of the bills--perhaps it was an earlier one--the director or the commission--

Mr. Howard: I think in section 246. That is the oppression remedy, isn't it?

Mr. Renwick: Well, I do not want to delay us if I am in error that the commission has no role here.

Mr. Howard: The commission has a role in what we have humorously called the Renwick--

Mr. Renwick: Oh, I see, I understand the point. Thank you. Then I withdraw the suggestion that perhaps it is novel. It is not such a novelty that it would offend me to suggest that in the reasons are given we should consider this alternative model very seriously when we are in the committee. I would ask, and I think it

would be appropriate, Mr. Chairman, for either legislative counsel or the ministry counsel to draft an alternative model proposal that would incorporate the suggestion that instead of using the court in the proposal section we use the commission, so that we would have before us an actual wording for the alternative model which is proposed. Otherwise, I would have to request the legislative counsel to prepare one for me, and it would be more efficient and helpful if the ministry's counsel would do that, or the legislative counsel.

Mr. Mitchell: I would not want to say that we are closed to re-examining this, but I will tell you quite honestly it is our initial reaction that section 98 would in all probability have to stay in the fashion in which it is currently drafted. However, we will have a further look at it, Mr. Renwick, just to be sure that we are not--

Mr. Renwick: All we can do is persuade, that is all we can do.

Mr. Elston: There are certain difficulties I have discovered in conducting an effective persuasive campaign in this committee, and even when some things may be superficially appealing, which is the word which has been used at some time, but I want to support Mr. Renwick. My initial comments were going directed toward the question of whether or not to use the courts or whether or not to use the Ontario Securities Commission or some sort of a mechanism along that line.

I rather think, as Mr. Renwick has suggested, that whether we go to the courts or whether we go to the securities commission, or whatever, there will be some kind of a cry that says we have not got the staff, we have not got the funds, no matter where we go, and certainly the argument developed concerning costs and concerning backlog already in the courts is one thing that we really ought to consider when we start creating new pieces of legislation or at least new operations under legislation which automatically go to the courts. That has traditionally been where we proceed first and for some reason we think automatically that it is going to be taken care of right away. It is not always simple to delegate to the courts that sort of responsibility, to deal quickly with the type of concerns which these people have brought to us.

At the same time, when I initially indicated I wanted to speak, I thought it might be appropriate to turn the question just slightly from the way it was addressed to Mr. Howard. His suggestion was that there have been deliberations and bouncing these ideas off various people in the public who are practising and have the day-to-day experience with operations. I appreciate that sort of comment, and I understand the process has gone on and that he might not be able to comment just on the spur of the moment with respect to a radical change in direction, but I think maybe he ought to suggest to us why we would stay with the shareholder proponent being required to go to the courts or to some other body, if I might just phrase it that way.

When you consider legislation and put it together, there has to be a reason or at least a rationale behind maintaining or

changing, and certainly they must have a rationale for maintaining the shareholders' responsibility for obligating the corporation to include the proposal. If I could turn the question just slightly to that angle and have you deal with it that way rather than not being able to deal with departure, as suggested here.

11:40 a.m.

Mr. Howard: Again I have to say that we are tracking for uniformity the Canada Business Corporations Act. The provision equivalent of section 98 has been in place under the Canada Act since 1975, and I am not aware that there have been any problems. Perhaps members of the bar could answer that. Have there been any problems that you are aware of?

Mr. Chairman: Mr. Hebb, perhaps you could respond, or another representative of CBA? Would you give us your name, please?

Mr. Westlake: My name is Brian Westlake. I sat on Mr. Hebb's committee on the Canadian bar. Just to give him a break from responding to the item, I am not aware of practical problems being confronted, but I can just give a little different emphasis. Our objective criteria laid out in the statute here as to when a proposal may be rejected by the corporation, is the corporation has to give written reasons for its refusal. It has objective criteria to comply with. It is not a frivolous act on the part of the corporation.

I can assure you as a corporate adviser, any such rejection would be given most serious consideration by the corporation before they turn it down. In effect, the onus is going to be on them. If the shareholder wishes to pursue his remedy further, surely the onus should be on him if he doesn't agree with the reasons for the refusal. As far as whether it be to the court or the commission, that is a policy matter again, as to which would provide the easier access. I agree that the commission would be a more accessible body in terms of the shareholder's ability to get his case fairly readily before a tribunal for an objective hearing.

To reverse the onus and require the corporation to rebut every rejection of a proposal is really playing into the hands of the heretics if they chose to abuse the processes of the statute.

Mr. Ridout: Mr. Chairman, this works very well in the United States. The Securities Exchange Commission in the US takes shareholders' proposals that are refused by the corporation and deals with them and assists the shareholder in phrasing the resolution so that it is acceptable. The shareholder doesn't usually have a battery of lawyers available to him that the corporation has, so that he isn't able to deal with the reasons for rejection given by the corporation.

If the onus was on the corporation and it did go to the staff of the securities commission to assist the shareholder in phrasing the resolution so that it is acceptable, it would be a much easier way to deal with it.

We are concerned with shareholders' rights here and it

bothers me that there is so much reliance placed on the board of trade and the bar association by the ministry for advice on this matter. It almost seems like putting a wolf amongst the sheep. I would like to see the committee consider the opinion of the board of trade and the bar association, but at least give some special consideration to a group of people who have acted as shareholders in trying to put some of these things into effect.

Mr. Chairman: Mr. Howard, I think perhaps you could expand. I know the Institute of Chartered Accountants was another group Mr. Howard referred to yesterday.

Mr. Howard: I find it a little difficult. Perhaps in my old age, I am getting a little impatient.

We have been working on this bill since 1975 in various aspects. We exposed a complete draft in March 1979. There were public exposures subsequently. We have just heard from you within the last two or three days. Where have you been?

Mr. Ridout: We did not know anything about it.

Mr. Chairman: Perhaps the points are well made. May we then leave, again with time pressing, section 98? It will certainly be dealt with later in the clause by clause. Can we go back to recommendation number five, which is a new matter, the permanent social responsibility committee matter? Does anyone wish to question or speak to this?

Mr. Mitchell: Mr. Chairman, other than to say that it is a concept that was enunciated, I believe, by the Ariadne Group--if that is the correct pronunciation--it is not something that is precluded. In fact, the corporation can set up these committees. Whether we want to enact it into the bill or not is something that, as I have indicated before, we will be taking the seriousness with which these recommendations have been put forward and we will be discussing them. I do not know what our position would be as to putting it in the legislation at this point in time, but I will say that it is not the first time that it has been presented. It was presented yesterday, as well, by another group.

Mr. Chairman: Are there other comments with regard to this recommendation?

Mr. Renwick: Mr. Chairman, I need some professional assistance, either from the ministry's lawyers or from our very helpful colleagues from the bar association on the question of committees. This whole question of committees of boards of directors is one which is proliferating, as everyone knows, and the capacity of the board to appoint committees, of course, is severely limited in the statute in the sense of being anything other than convenient methods of assessing a particular problem. They have got no executive authority, as I understand it.

The only committees that are recognized are the traditional executive committees, and in the last number of years, audit committees. It was decided to give the audit committee a special status as there was developed over a period of time the need for

such an audit committee. It is not a sufficient answer to say that the board of directors can appoint other committees. The other committees have absolutely no status in law.

That is the question on which I would like to have professional assistance. Am I correct that the board may appoint a pensions committee, a remunerations committee, a personnel committee, anything they want to do, but there is no statutory recognition? Am I correct or incorrect?

Mr. Wells: You are correct, in essence. The board itself is responsible for running the corporation and it can only delegate its responsibilities in certain instances, and that includes the executive committee et cetera, and to certain officers like the president et cetera. Any other committee, such as a social development committee, of course, would be advisory. It would be up to the board to implement any recommendation made by that committee, as it stands now.

Mr. Mitchell: If I may, just as an aside comment, Mr. Chairman, since we are talking about committees, if we could equate to the committee before us, I notice that Mr. Davis is the treasurer for the United Church of Canada and, if I looked at myself, as a member of the United Church of Canada, as being a shareholder in that United Church of Canada, I have nothing to say. I was not asked my opinion, and so on, about the setting up of your particular task force. They did not ask me from the pulpit of the church, the one I belong to, whether I agreed with the setting up of this committee. However, the committee has been set up, and I think it has done a very excellent job of making a presentation here today.

I guess really the point I am making is that the type of committee you are talking about here--I stand to be corrected on the name, social responsibility committee or whatever--surely should fall within the area of the responsibility of the board of directors. The audit committee has been singled out specifically, but if you are talking about social responsibility, that should be left in the hands of the board of directors as, in fact, with the creation of your committee.

11:50 a.m.

Mr. Davis: I would be happy to discuss the shareholders' rights in the United Church and how those things are handled, if time permits, because there are ways in which you have been consulted. Whether you are aware of them is another question.

Mr. Mitchell: I have not been consulted. I don't mean to get into an argument about the church. I was using that perhaps somewhat facetiously. I guess the point I was trying to make is that I am not necessarily opposed to the type of committee you are recommending, but I do not think it is a committee one necessarily wants to write into law. If the corporation wishes to retain a good image, I suspect that is one committee they would be quite interested in setting up.

Mr. Creighton: You might be interested in the Canadian

Institute of Chartered Accountants' recent research publication on audit committees. One of the questionnaires sent out asked the various groups interested in audit committees what they thought the future responsibilities of the audit committee might be. I was interested to see that social responsibility was mentioned by some significant number of the respondents to these questionnaires. So there is evidently out there in the big bad world a feeling this is a real need and there ought to be a corporate home to put it into.

Mr. Renwick: I was interested yesterday when we were given these two booklets, Social Responsibility and Corporate Conduct, the policy statement of the Canadian Imperial Bank of Commerce, and Alcan, Its Purposes, Objectives and Policies.

My problem is that until one can get the boards of companies, particularly offering corporations, to recognize their social responsibility, I have difficulty making the hurdle of requiring them to have a social responsibility committee at this time. It seems to me the main hurdle is that we would be kind of legislating through the back door. If the euphemism of corporate citizenship is going to grow as an accustomed way of talking about corporations that have no physical being at all--in other words, if we are going to continue this euphemistic language of corporate responsibility, and if we are going to get these kinds of statements from boards--then I think we will be moving into an area where we are going to have to require certain standards of social responsibility from these so-called corporate citizens of the country.

Whether at this time we should be specifically establishing a special type of committee, recognizing the point we made a few minutes ago that there is the executive committee and the audit committee but that's all, and if you are going to give certain statutory limited responsibilities to a social responsibility committee, maybe that is the best way of emphasizing that this Legislature says to the corporation, subject to its governance, that maybe the time has come for corporations to be specifically fixed with a recognition of their social responsibility. Again, we are talking about the rough and ready classification of offering corporations as distinct from nonoffering corporations.

I think it probably makes a lot of sense at some point for us to have another classification and that is public accountability companies. That may not necessarily be synonymous with offering corporations. It might be a much smaller group of corporations which have a social responsibility and a public responsibility which has not yet developed to the point of fruition as a concept.

I can explore and I can see arguments for it and I can see arguments against it. I am inclined to think the social responsibility question is one the directors are initially going to have to address. Whether or not it is possible in this act to fix the board of directors of a corporation with the general responsibility to manage or to supervise the management of the business and affairs of a corporation which is its fundamental obligation, whether or not that is not the place that one puts in an indication, consistent with its social responsibilities or some such directive flag of responsibility from this Legislature to those business corporations that, yes, there is an obligation to

look at something other than the discipline of the balance sheet with respect to the way in which it conducts its business.

All you have to do is open any magazine in the country or to see any television show in the country and you will find the immense number of dollars spent in public relations advertising by significant corporations on all sorts of items--the environmental responsibility of corporations when years ago the very same corporations were among some of the leading, in modern terms, polluters in the country.

The whole thrust of the Canadian Imperial Bank of Commerce putting out a document like this and classifying its various areas of responsibility seems to me to be a clear indication the leading corporations in the country are trying to move to something beyond just public relations to something called a recognition by the boards of their social responsibility.

It would not be breaking new ground for this assembly to say, "Well, perhaps we should catch up in our legislation with the Commerce." Maybe we do not have the same vested interest as the Commerce but maybe it would not be too dramatic for this committee somewhere with appropriate language to say to the boards of directors of companies that, "Yes, you do have obligation to supervise the management of the business and the affairs of your corporation, but you must exercise that power consistent with the social responsibilities of your company."

It seems to me that such a flag in a statute being passed by us would indicate quite clearly that perhaps you could get around to appointing a social responsibility committee of the board of directors. As you can see, Mr. Chairman, I am talking myself into a position.

Mr. Davis: Perhaps to reinforce the position Mr. Renwick is talking himself into, I would just point out that Ernst and Whinney, which is a major firm of accountants, has done a study which they have maintained year by year.

The last time I looked at it, I think 85 per cent of the Fortune 500, which is the top 500 American corporations, had some form of corporate responsibility reporting in their annual reports. The fact that you were given the Commerce code and Alcan's yesterday should not suggest that those are the only two. It is a fairly common thing for the five major chartered banks to have a code of conduct, which is a public document.

The point of legislation is that it catches up that 15 per cent that are lagging behind. It sets something out there so that there is at least some minimum level of consistency.

Mr. Ridout: One addition to that: It is becoming good public relations to issue a glossy-covered code of conduct in the larger companies, but the proposal you have before you here is that be measured by a committee of the board just as the financial performance of the corporation is measured by the audit committee.

We are proposing this committee on social responsibility

measure the performance of the company, if they have a code of conduct, against the code of conduct so that it isn't just a glossy brochure, but it really means something and the shareholders will know how the company has performed against this code of conduct, just as they know how it performs against financial projections.

12 noon

Mr. MacQuarrie: I find it quite difficult to comprehend some of these things. I suppose we can talk about social responsibility in the abstract, but it is rather an elastic sort of phrase. I know some of the churches took stands on shipments to South Africa and this sort of thing and businesses dealing with South Africa. I suppose that is one of the emerging political situations, or would it be social?. In terms of laying judgements, if Massey-Harris could sell 10,000 tractors to South Africa tomorrow, it would be--

Mrs. Hutchinson: We are suggesting that the corporation would establish its own code of conduct. It could decide whether South Africa was part of its code.

Mr. MacQuarrie: I realize that in a so-called code of ethics, in an internal code of ethics, they are supposed to subscribe to it.

Mrs. Hutchinson: This committee would be responsible for monitoring its own shareholder-approved code of ethics.

Mr. MacQuarrie: I appreciate that.

Mr. Chairman: In the interests of pressing on, may we limit our comments on recommendation five to what we have heard and press on with recommendation eight, which is a fairly lengthy list, (a) to (p) inclusive? It deals with uniform public disclosure requirements at the bottom of page 11 and all of page 12. Are there any comments with regard to recommendation eight?

Mr. Creighton: Mr. Chairman, we would ask only for mandatory disclosure of (a) to (i), sir. The others, (j) to (p), are matters on which we would like the shareholders to be able to inquire of the management and to be assured of getting a response, but we don't picture them as being in the annual report. I must confess we have not solved these practical problems of how that response could be guaranteed or what the nature of the response might be.

Mr. Renwick: I have only one comment on it. Without speaking to any of the itemized matters which are there, the restrictive interpretation being given both within the professions and in the courts to the term "material" in all questions of disclosure by corporations means that the wit of man is going to have to find another word to describe what should be disclosed and what should not be disclosed.

We have had this continuing argument. We have tried to get it changed in the securities act to have some wider sense of what "material" would mean because all disclosure is conditioned on

whether or not it is material, and somebody has to make that decision. Unfortunately, it has been made in such a way that large areas of concern, such as a number of those listed in the submission before us, are considered to be not material. That is the problem that this points up.

I have every hope that over time the information circulars of companies, both for annual meeting purposes and for other purposes, will give a broader scope to what they should or should not disclose. Whether it should be all of the these items or these kinds of items, I think it is a stimulus to it. When we come to clause by clause, we can then look at those that are tagged to particular sections to see whether or not it makes any sense. I, for one--and this has nothing to do with this submission before us--am immensely concerned with at least the authority under which corporations make contributions to political parties for election campaigns.

Mr. Hennessy: What about unions?

Mr. Renwick: When we have a trade union bill in front of us, perhaps we could discuss that. We find that trade unions are collections of individuals who--

Mr. Hennessy: Voluntarily?

Mr. Renwick: Perhaps I could send you my remarks on second reading of the bill, when I pointed out that collections of individuals who try to better their working conditions are separate and distinct from corporate organizations which are carrying out profit-making activities. Corporations, as such, do not vote. Each of the individual members of the trade unions does vote.

In order to solve your problem about trade union contributions to the New Democratic Party, it may well be possible for us to limit the Conservative Party to the same level of contributions that the New Democratic Party receives from the trade union movement. Those are matters, of course, which we will be dealing with when the election expenses bill comes before us.

I just wanted to signal, and I am glad that I did signal this morning, my interest in the question of the authority under which corporations divert funds of the corporations to particular political parties in the political world in which we operate and the legitimacy of those contributions and whether or not they should be subject to some sanction by the shareholders at a particular formal meeting. I know Mr. MacQuarrie would be very interested in that topic.

Mr. Chairman: We are getting a little far afield on both sides from the bill in front of us. Are there any other comments with regard to recommendation eight specifically? No. May we carry on to recommendation nine?

Mr. Mitchell: With regard to what is referred to in recommendation nine, we have also received a brochure. I think it was the code of conduct of one of the banks that we received. I am not sure how this could be put in, but again I will say that each

one of the recommendations you have put in here will be reviewed. I see perhaps some difficulty, but it may not be there. Not being a lawyer, maybe I am seeing problems that do not exist. We will have a serious look at all of the recommendations you have made here. However, I would be less than honest if I suggested to you that all or any of them will be included in any amendments that might be proposed.

Mr. Davis: I will put a question to the committee as a whole. I see people with Alcan's code and the Commerce code, and I gather this has made some impact. Would it be helpful to have a bunch of other codes, or is this sufficient? There are lots of them around. Canada Cement just sent out one with the request that shareholders should respond so that management can amend the code to fit the shareholders' particular view of the company. It seems to me that will be very helpful. Would it be helpful to the committee to get more of these, or is a sample of two sufficient?

Mr. Mitchell: From the fact that you are pointing out that there are a great many of them already issuing this, perhaps the corporations are responding to the concerns you have raised here and there is not the need to put it into legislation.

Mr. Renwick: You have missed the point. I would not want to open it again, but we can do it later.

Mr. Davis: I was looking for an expression from the committee. I do not mind gathering information and disseminating it if the committee wants it.

Mr. Renwick: It would be helpful for me to have one from an oil company, one from Inco and one from one of the pulp and paper companies.

Mr. MacQuarrie: How about Suncor?

Mr. Laughren: Falconbridge might be better.

Mr. Chairman: Being practical, Mr. Renwick, are you suggesting that we try to have that before we get to clause by clause?

12:10 p.m.

Mr. Renwick: I think it would be helpful. We could have a selection of three or four others that are particularly pertinent in Ontario.

Mr. Chairman: Mr. Davis, are you able to come up with several of those on very short notice?

Mr. Davis: I have a whole batch of them at the office. I have lent them to brother Creighton here, but in any case I haven't got them in quantity. I would have to go to Imperial Oil and pick them up.

Mr. Chairman: No. It would be fine if you could give us one.

Mr. MacQuarrie: It might be interesting.

Mr. Renwick: You have close corporate relations with them anyway, don't you?

Mr. Davis: We will endeavour to get you an interesting little cross-section.

Mr. Chairman: If you would, please, and we can photostat them from there--not unless they have a head office in Oxford county.

Mr. Davis: May I ask one second question? I am not sure, but did the Institute of Chartered Accountants present some sort of document about this?

Mr. Chairman: Yes. They were the second group to appear before us.

Mr. Davis: Was there any focus there from the Adams commission?

Mr. Renwick: None at all.

Mr. Chairman: They were only concerned with the audit provision.

Mr. Renwick: Under 147 they indicated that they had been involved in the process, and they approved of the rest of the act with one exception.

Mr. Mitchell: The exception was 147. The requirement or non-requirement for audit was the major thrust of their presentation, I believe.

Mr. Davis: There is a reference in our document to the report of the Adams commission, which was adopted by the chartered accountants. Again, I may be able to present more of that information, if that is helpful as well.

Mr. Chairman: They did not raise that.

Mr. Creighton: Mr. Chairman, could I say to Mr. Howard that the reason we weren't here in 1975 is we hadn't had the thoughts that we have brought here? If we had had the thoughts we brought here today, we would have been here today with other thoughts.

Mr. Chairman: Thank you very much, Mrs. Hutchinson and gentlemen. Shall we press on? Perhaps we can get 15 minutes of Mr. Coombs on an entirely different subject. I am asking him to lead off because I believe his comments are relevant to the Toronto Stock Exchange and Midland Doherty presentations we will hear this afternoon.

Gentlemen, just to refresh those who were snowbound elsewhere, Mr. Coombs is one of three solicitors from the firm

Osler, Hoskin and Harcourt here in Toronto who is representing the Canadian Bar Association. The other two solicitors, Mr. Hebb and Mr. Levitt--Mr. Levitt is not here this morning--dealt with the bill in an overall technical sense, nonpolicy, and they left to Mr. Coombs one specific area dealing with the national energy program. It is more of a specialized area.

Mr. Coombs, perhaps you would carry on, and thank you for being patient with us this morning.

Mr. Coombs: I found it very interesting, Mr. Chairman. Thank you. I have really divided my remarks into two separate areas. Before lunch we might get in the first of these, which is an attempt to give you an overview or a general description of the thrust of this body of amendments that is being proposed.

I am not here to explain the national energy program to you. I am not sure I could in any event. I am here more as a corporate technician than a petroleum technician. I can suggest to you some areas of the national energy program that are relevant to these amendments, explaining to you exactly how a lot of those principles I may mention will operate. It is going to be difficult because since the last public disclosure of the legislation the federal government will introduce in connection with their program, there has been a tremendous amount of drafting and alteration going on in Ottawa, to which I am not privy. If you ask me to explain to you how the Canadian ownership rules operate, I probably cannot do that for you explicitly.

Going into this general overview, however, I am sure you are all aware, the federal government has established a program by which it intends, among other things, to encourage the Canadianization of resource companies, petroleum and natural gas companies. A principal element of that program will be a system of grants and incentive payments which will be made available to corporations, depending upon the nature of their activities, and primarily depending upon whether they meet certain standards of Canadianization of their shareholding.

The thrust of that concept of Canadianization is to reach the beneficial ownership of the shares. Very often the shares of the resource companies with which they are concerned will be held by other corporations, holding corporations, and the true ownership may be masked. The intent of what are called the COR rules, Canadian ownership rate rules, is to provide a measure of the true beneficial Canadian ownership of those companies and to gear the grants and incentives payments to that ownership.

So a corporation that can demonstrate only, say, 40 per cent Canadian ownership rate, will not obtain as much in federal government funding as will a corporation that can demonstrate an 80 per cent Canadian ownership rate, or 100 per cent Canadian ownership rate.

The thrust of these amendments is to provide the technical capital structure in the corporate governing statute to assist corporations to qualify, to demonstrate that they have sufficient COR, or Canadian ownership rate, to qualify for grants that they

need. Because of the way the grants will be managed, this is not a one-time assessment. I believe annually there will be some attempt made at assessment of each corporation's entitlement to retain its grant status.

So the corporation will have to be able to ensure that, not only on the initial issue of its shares or a class of its shares to people who satisfy the relevant COR requirements but also at future times, it will be able to satisfy the administrative agencies that it is still entitled to receive those grants. This means there has to be some control over what happens to the shares after their initial issue. We looked at that really, I think, in terms of providing mechanisms for policing share ownership in respect of certain kinds of shares.

There was no intention, however, to interfere any more than necessary in the freedom of shareholders of public offering companies to transfer their shares in an after-issue market. The object was to prevent shareholders from so dealing with their shares as to destroy or damage the corporation's grant status. This was viewed by the various people who were involved in the drafting as being not so much a mechanism for interfering with a holder's freedom to transfer his shares or interfering with the rights of some subsequent shareholder, but really as a means of protecting the Canadian shareholders who stay in the company so that they do not lose the benefit of these grants which, in a financial sense, will be very significant to the health of many energy corporations.

The technique that was chosen federally for doing this was to expand the concept of what is called the constrained share. In section 168 of the Canada Business Corporations Act as it now stands, the concept of the constrained share corporation has been established and principally relates to corporations who need now, under present rules, to retain their status as Canadian owned in some way. It seemed to the drafters of the new legislation that this was an ideal sort of concept to bring in, because there are already corporations governed by the CBCA whose share ownership is, to a degree, policed through the mechanism of a constrained share.

A constraint under section 168 originally would have restricted the issue or transfer of shares to persons other than a permitted group or groups of shareholders. What is being proposed is that not just issue and transfer will be controlled, but for national energy program purposes ownership will also be controlled.

12:20 p.m.

So the constrained share concept has been expanded to look not just at the technical question as to who is on the shareholders list, but who really owns the share. In this sense, constrained shares are really just a subclass of the restricted share which you would often find, for example, in a private company. I am sure you are all familiar with corporations where a particular family wants to retain control of it and the board of directors will be able to decide whether a transfer of shares to some particular person will be permitted or not.

You should keep in mind that the constrained share,

especially under the federal act, was a concept designed for public offering companies. In fact, it is the only kind of restriction at the moment that a public offering company can impose on the issue or transfer of its shares. For example, it would be possible under the law as it now stands to restrict ownership of shares to resident Canadians or to provide that an individual shareholder could only own up to a certain percentage of shares of the corporation and so on.

Authority for the creation of constrained shares or, in the context of the language you will find in the bill before you, restricted shares, primarily stems from amendments that will be proposed to you to section 5 of the bill and by amendments to sections 166 and 168; section 5 because it is the provision that relates to what has to be in the articles of the corporation when it is created; sections 166 and 168 because they relate to what kind of amendments to the capital structure of an existing corporation can be made.

Where national-energy-program-type restrictions are contemplated to be introduced by the creation of a new class of restricted shares or by fundamental change to the capital structure of the corporation, it is proposed that there will not be any right in the existing shareholders to separate class or series votes and hence there will not be any dissent or appraisal rights for them, provided, that is, that the new class of shares is otherwise equal to the existing class of shares. Where, however, an outstanding class of shares of a corporation is to be restricted for NEP purposes, the existing shareholders will have class or series voting rights and will have dissent and appraisal rights.

There is no suggestion in the legislation that it will be possible for a corporation to override the interests of the body of existing shareholders without their consent, impose these restrictions and thereby put a large number of foreign or partially foreign shareholders offside. Votes are contemplated for that purpose. It is not inconceivable, however, that a corporation with an existing class of shares now outstanding could not achieve some degree of Canadianization by simply creating a new class of shares, issuing those to the public on the basis that only Canadians or people with acceptable Canadian ownership rates can acquire them, thereby achieving not a full Canadian ownership rate to satisfy whatever grant requirements we are looking at, but in effect to ameliorate what may be its existing COR status.

Apart from questions of the capital structure of the corporation, the more profound changes to the act and indeed to the whole concept of shareholders' rights will be found in two areas. One is the way in which the restrictions that are going to be imposed on shares of this nature will be enforced in the aftermarket, the policing power. That will be found, when you get to it, in the proposed new section 44(a).

Section 44(a) is a quite radical departure from any existing corporate law I know of. It proposes, in effect, that where shares are transferred to an ineligible holder, the corporation when it finds that out will be able to sell off that holder's shares without his consent. Many people have viewed this as being a

species of expropriation and you may well wish to look at it that way philosophically. You must keep in mind, however, that the shareholder will have acquired these shares or the shares will have become restricted through the consent mechanisms at corporate meetings with the full knowledge and understanding that he is buying a share that is subject to this kind of limitation.

Indeed, you can expect, for example, that the shares of Canadian energy corporations will suffer some diminution in value, I suppose, in the sense that the market for the constrained or restricted shares of those corporations will become limited because the buyers of those shares will only be people with acceptable Canadian ownership rates. I am not an economist. I cannot tell you what the significance of that is in dollar terms, but you are going to be restricting the market for shares of that nature.

The second change which I think is profound in this area is perhaps a little more esoteric. That is, it is proposed that corporations will be given the power to buy in their own shares. This is a consensual thing. They will be able to go to the marketplace, buy in their own shares--what I would call free shares, nonrestricted shares--hold them for up to two years without cancelling them, just as if they were the owner of them. They would not be able to vote in respect of them or anything of that nature, but they would be able to hold the shares without cancelling them or restoring them to the status of authorized but unissued shares. Within that two-year period, they would be able to resell those shares to the public.

That might sound a little futile, but what is really contemplated there is that while it is holding the shares, the corporation will convert them from their free status into a restricted share. When it does its subsequent issue or resale of those shares, it will sell them to people with acceptable COR. By that method, for example, a corporation whose shares were trading, say, on the American Stock Exchange and in Toronto would be able to go into the American Stock Exchange and buy up shares at whatever the going market price was, would be able to hold those shares, convert them into restricted shares, do a subsequent issue of those shares into Canadian hands, combined perhaps with an issue of another class of shares, also restricted to the Canadian public.

It will give you a multiplying effect to the Canadianization of the company, because you will taking shares principally out of the hands of foreign holders and putting them into the hands of Canadian holders.

I cannot speak, of course, for the federal government on that, but it is viewed federally, I believe, as being an assistance to corporations rapidly to Canadianize. That is going to be important for a number of reasons, one of which, of course, is that the faster a corporation can catch up with other corporations which have high levels of grant, get the same grants and use that money to go out and explore for new energy, will mean that those corporations will maintain their competitive status, they will increase the availability of energy and so on.

Mr. Chairman: I do not want to interrupt you, but is there a natural place for you to break?

Mr. Coombs: I think I am coming to it, Mr. Chairman.

Just to go over again those two points I have made, the first one permits the compulsory sale of shares held by offside persons, persons with insufficient COR. The second one permits the corporation in effect to assist in its own Canadianization. It will be able to do this without affecting its retained earnings. There are technical reasons in the act for that which we can get to later. If it does not have to cancel the shares, it does not have to reduce its stated capital and it does not have to reduce its retained earnings, so its dividend-paying status will not be affected.

Mr. Laughren: Is a question appropriate now or would you rather wait? It is up to you.

Mr. Chairman: With those two points made, yes, would you?

Mr. Laughren: What happens if a corporation purchases those shares in its own self-Canadianization process and in the interim, before it resells them to the public in a restricted basis, is it then considered not to have been more Canadianized than it had been previously?

Mr. Coombs: While the shares are being held by the corporation?

Mr. Laughren: Yes, before it gets to the point where it has either accumulated enough shares or has got its act together to reissue them on a restricted basis.

Mr. Coombs: I think the way the COR rules will operate in that regard is that the shares simply will not be counted. In terms of determining the Canadian ownership rate, they will not appear in either the numerator or the denominator of the fraction which will determine the percentage of Canadian ownership.

12:30 p.m.

Mr. Laughren: Except that the proportion of shares held by Canadians would be higher.

Mr. Coombs: Potentially that would be so, yes. The reason for the two-year period, by the way, is really to give the corporation enough time, having bought the shares in, to engage in some program where on day one it will buy some shares and it will continue buying so as not to adversely affect the market. It has got to have time to get in a sufficient number of those shares and then to get together its materials to do a public offering of those shares. We felt that two years was the minimum time in which that could be accomplished.

Mr. Laughren: To aid the Canadianization process without merger or takeover.

Mr. Coombs: Yes.

Mr. MacQuarrie: I have two short questions. What about the method a lot of corporations use to raise money, preferred shares redeemable with the dividend sold to non-Canadians with nonvoting power and common stock held in Canadian hands. Are there any restrictions on that type of--

Mr. Coombs: It will be possible to restrict any class or type of share so that you could have a share of that type that was restricted as to ownership. All classes of shares would be considered for the purposes of COR determination. It is not just a concept restricted to--

Mr. MacQuarrie: Preferred shares, of course, would come in on winding up.

My other question concerns a Canadian company owned by a Canadian individual. He dies and he has a lot of children scattered all over Canada, plus some in the United States. The company is left to the children. What happens to the shares?

Mr. Coombs: Do you mean if they are restricted shares?

Mr. MacQuarrie: No. This is a Canadian company holding shares.

Mr. Coombs: Potentially that could damage the corporation's COR status if those shares are--

Mr. MacQuarrie: It depends where the children are domiciled or resident at the time. Is that it?

Mr. Coombs: Yes. There are certain rules that would deal with small holders, for example, in the COR rules. I really don't know what the figures are, but holdings below a certain dollar level, for example, would be presumed to be Canadian.

Mr. Chairman: Thank you, Mr. Coombs. May we recess to reconvene at two o'clock? If any of you have the amendments that have been handed out, I am taking them back to have them put in order. They are so badly out of order as to make chaos when we get to clause by clause.

Mr. Renwick: On the question of amendments, which one should we be looking at?

Mr. Coombs: I was hoping that when we reconvened after lunch, Mr. Chairman, we could--I will just go through them and pick out the ones that are--

Mr. Breithaupt: Let's skate through them the way they are then, first of all.

Mr. Coombs: I am going to go through them in numerical order.

Mr. Breithaupt: Oh, they are not in order?

Mr. Chairman: They are in hideous order.

Mr. Breithaupt: Whatever you like. You want to have them redone?

Mr. Chairman: Yes.

Mr. Breithaupt: If you want to have them redone, that's fine. You're the boss.

Mr. Chairman: My secretary is going to have to do them. If there was only one page out it would be one thing, but there must be 10 pages out and we would be just be in chaos trying to--

Interjection: We will try to make a synopsis at noon hour--

Mr. Chairman: Yes. She will do a synopsis.

The committee recessed at 12:34 p.m.

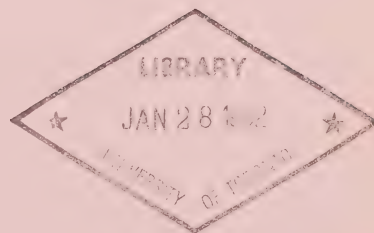
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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BILL 6, BUSINESS CORPORATIONS ACT

WEDNESDAY, JANUARY 6, 1982

Afternoon Sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

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Andrewes, P. W. (Lincoln PC)
Breithaupt, J. R. (Kitchener L)
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Gordon, J. K. (Sudbury PC)
Laughren, F. (Nickel Belt NDP)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
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Kolyn, A (Lakeshore PC) for Mr. Kells

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From the Canadian Bar Association (Ontario Branch)*
Coombs, M.,
Hebb, L., Chairman, Committee on Bill 6
Sorell, R.,

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday, January 6, 1982

The committee resumed at 2:10 p.m. in committee room No. 1.

BUSINESS CORPORATIONS ACT
(continued)

Resuming the adjourned consideration of Bill 6, An Act to revise the Business Corporations Act.

Mr. Chairman: Gentlemen, there being a quorum in the room, may we carry on? It has been suggested that, in view of the Toronto Stock Exchange representatives being scheduled for two o'clock, perhaps Mr. Coombs would simply summarize in about five minutes what he said this morning and then he will leave the technical part of his presentation until later in the afternoon. It was thought that once we got into the technicalities and then the questions, it would extend into an hour and hold up other people.

Mr. Breithaupt: If time is not otherwise available, perhaps those presentations could be made as we are in the clause by clause directly. That is another way of doing it if we have to.

Mr. Renwick: I am quite happy to have Mr. Coombs summarize and move on and deal with the technicalities, but I do want to know which of this bundle I must read.

Mr. Chairman: Those are now in order.

Mr. Renwick: I know they are in order and that is a great help in itself.

Mr. Coombs: Do you want me to list the section numbers?

Mr. Renwick: Yes, I would like you to. A lot of these are consequential amendments obviously.

Mr. Chairman: Mr. Coombs is not going to deal with the amendments in this five minutes.

Mr. Renwick: I am not asking him to deal with them. I am asking him to give me the numbers from this bundle that I am to read.

Mr. Chairman: I see. With divided attention you are going to try to read and listen to various things at the same time?

Mr. Renwick: No, I just want the numbers.

Mr. Chairman: Which numbers would you refer Mr. Renwick to?

Mr. Coombs: Sections 5, 29, 35, 42, new part III-A,

section 44a, section 55(8), (9), (10) and also 55(3)(a), sections 166, 168, 183, 256, 270.

Mr. Renwick: Thank you.

Mr. Coombs: Here endeth the lesson.

Mr. Breithaupt: You have been very helpful.

Mr. Chairman: Mr. Coombs, for everyone in the room, would you carry on with a brief summary of where you led this morning?

Mr. Coombs: Very good. The thrust of the package of amendments is to provide for capital structures that will assist corporations to Canadianize in order to meet the requirements of the national energy program. Essentially, that means they have to develop capital structures that will enhance their Canadian ownership in order to qualify for grants and incentive payments under the various federal acts that will be coming through Parliament this year.

What is contemplated is a new kind of share that will be restricted as to ownership. The share will be restricted as to its issue, as to its transfer, and as to its ownership to persons who are either Canadian, if they are individuals, or who have a satisfactory Canadian ownership rate if they are not individuals. Those persons will be able to transfer those shares freely in the public market subject, of course, to the transfers being made only to persons who satisfy the restriction requirements.

In order to police the ownership of those shares, because the corporation is going to have to continuously satisfy the patrolling monetary agency of its status for grants, and so on--they will have to make some sort of annual report, I gather--the corporation needs some method of eliminating shareholders who ought not to own the shares. For that purpose, we have developed a section that provides the company with the power to sell out a shareholder with an unsatisfactory COR in the event that he gets hold of the shares and it is discovered he has got them. That is a radical departure from anything we now know of in corporate law, but I suggest it should be thought of in terms of protecting the other shareholders of the corporation whose interest in the corporation, and whose expectation of profit, is really geared to the government incentives.

The corporation will also be provided by the legislation with another method of Canadianizing. It is linked to the restricted share regime but it is really just a wrinkle on existing corporate powers. That is, the corporation will be empowered to buy in its own shares, convert them from free shares, nonrestricted shares, into a class of restricted shares, and then do a fresh offering of those shares to the Canadian public. The peculiar thing about that from the corporate point of view is not so much the corporation can do it as that in doing it the corporation will not have to reduce its capital and then bump it up again when it does the fresh issue so that in engaging in the buying, conversion and resale the corporation will not affect its retained earnings.

You should appreciate that if the retained earnings were affected by that kind of a program, which for many corporations could be quite massive, the loss of moneys available for the payment of dividends that would result could hamper the corporation in raising money with new capital. It could also depress the market price of its outstanding shares.

There are a number of other amendments that are connected with that general outline. Many of them are consequential. The sort of thing I am thinking of is that formerly restrictions on transfer have been the only kind of restrictions you have seen in the Ontario legislation. We are now talking about restrictions on issue, transfer and ownership of shares.

I think that is my summary of where it is.

Mr. Chairman: Yes, thank you. These are the two basic points you covered this morning. If you would hold yourself available now.

Mr. Coombs: Of course.

Mr. Chairman: The representatives from the Toronto Stock Exchange are here. There are two of you. We have down here Messrs. Pringle, Baillie and Wilton-Siegel. Who is here? Could you identify yourselves?

Mr. Wilton-Siegel: Mr. Chairman, my name is Herman Wilton-Siegel. I am with Tory and Tory. On my right is Mr. Larry Pringle, who is the vice-president, member regulation of the Toronto Stock Exchange.

2:20 p.m.

Mr. Chairman: Do we have a pre-presentation from you? Did you send us--

Mr. Wilton-Siegel: We have not, Mr. Chairman. We prefer at this point merely to make some general comments relating to certain principles we think ought to be incorporated in the amendments in relation to the constrained share provisions. If the committee thinks it useful, we would be happy to present a more formal written submission in the near future.

Mr. Chairman: No, I was thinking of one the members could follow as you read. Would you carry on?

Mr. Wilton-Siegel: I would like to deal very briefly with certain concerns on behalf of the Toronto Stock Exchange that relate to the constrained share provisions and in this connection to divide the submission we will make into three parts.

We will deal, first of all, with the traditional use of these provisions and the update today. Then we will explain at some greater length the particular reasons why the brokerage community is today interested in the amendments being adopted in the Ontario Business Corporations Act in this area. We would like to conclude with a general statement of the principles that, from the point of

view of the brokerage community, we think would be appropriately inserted or included in the statute to deal with their problems in the future. As I am sure the members are aware, these provisions have traditionally been associated with compliance by certain corporations under statutes that characteristically set maximum limits on the percentage of shares that may be owned by certain classes of person or shareholder. The characteristic example, I suppose, would be the limits in the broadcasting statute.

More recently, I suppose within the last 18 months, attention has tended to focus on amendments that are appropriately made to those constrained share conditions to accomplish the purposes or to enable corporations to obtain the benefit of the national energy program incentive payments. I understand that amendments have been or are going to be made in that connection. Our concern is that to some extent the debate now focuses on those provisions and perhaps ignores certain additional concerns members of the brokerage community have in the context of public ownership. I will deal with that in a moment.

Pausing just for a moment on the draft provisions of the Canada Business Corporations Act, there are three particular provisions in there that commend themselves to us and I would like to make a note of that and to come back to them. I understand the previous representative already pointed to the mandatory disposition or mandatory sale provisions that enable a corporation to sell the shares of a shareholder whose shares for one reason or another offend the constrained share rules. We think that is a very important provision in the context of the rules that will have to apply to publicly owned brokerage firms.

There are two additional provisions that I understand are proposed for inclusion in the Canada Business Corporations Act to which I would also like to refer. They are the right of a corporation to buy and hold securities of its own issue and to reissue them in constrained share form. That is one. The second is provisions that permit the creation of constrained shares without the triggering of the appraisal remedy in circumstances in which it is proposed to permit existing shareholders to convert their shares into the constrained shares.

Those are the three rules in the Canada Business Corporations Act that we would like to propose ought to be inserted in the Ontario Business Corporations Act and that ought to be made available not merely to corporations that propose to constrain their shares to take advantage of the national energy program, but also to publicly held brokerage firms.

I think the second part of the submission should involve a brief statement of where we are in terms of public ownership in the securities field by way of general background. As I am sure the members of the committee are aware, there has been discussion for quite some time, both by participants and by regulators in the securities business, in connection with the possibility of permitting brokers to issue shares directly to the public to assist them to raise additional capital.

In 1980, two members of the Toronto Stock Exchange announced that they desired to make public distributions of their securities to the public. They then followed a series of steps in which the matter was reviewed by the industry and by regulators across Canada. An industry study was undertaken and reported in the spring of 1981. The study itself was reviewed, as I understand it, by Canadian securities administrators at their annual meeting. The pro-forma bylaw, which gave effect both to the provisions of the study and the comments of the administrators, was then prepared and I believe passed by the Toronto Stock Exchange in June of 1981.

That bylaw was, in turn, considered at a joint hearing of the Ontario Securities Commission and representatives of the securities authorities in British Columbia, Manitoba and Quebec. As a result of that hearing, the Ontario Securities Commission announced that it was prepared to approve the Toronto Stock Exchange bylaw providing certain changes were made. Those changes have been made and the substance of the bylaw has been approved by the Ontario Securities Commission. At the same time, the commission has issued its own guidelines indicating the circumstances under which it is prepared to consider prospectuses filed by brokers at this time who wish to issue securities to public.

That is the situation. We are subject to the commission holding an additional hearing in the matter of institutional shareholdings in public firms in a position where public ownership of securities firms may be proceeded with in the relatively near future.

In those circumstances it might be appropriate if I just summarize the nature of this theme which is contemplated by both the Toronto Stock Exchange and the Ontario Securities Commission for publicly held securities firms. Basically it involves a requirement that 40 per cent of the directors be industry members appropriately registered under the Ontario Securities Commission and that all nonindustry directors be approved by both the Toronto Stock Exchange and the Ontario Securities Commission. Otherwise, subject to those requirements, it is now contemplated that public ownership of securities dealers may be proceeded with subject to two constraints, which I should deal with separately, relating to maximum limits on ownership in those firms.

The first limit is that no nonindustry investor, which means basically no nonparticipant in the industry, as a director or officer or any of his associates or affiliates may collectively have a beneficial interest which exceeds 10 per cent of the voting or participating securities of the dealer. In addition, there is carried forward the 10-25 rules relating to nonresidents which appear in the Securities Act which constrain nonresident shareholdings in the aggregate to 25 per cent of the total outstanding securities of the brokerage firm and constrain individual holdings to 10 per cent of such securities.

2:30 p.m.

In those circumstances, the brokerage community is concerned that it be in a position to restrain shares and enforce the 10 per

cent shareholding requirements related to all nonindustry investors, and the 10-25 rules which relate specifically to nonresidents.

The Toronto Stock Exchange bylaw specifically contemplates that before the approval of the Toronto Stock Exchange may be given certain provisions must be in place permitting such enforcement. Specifically, the bylaw contemplates that there must be provisions which prevent transfers in excess of those limits, there must be provisions which withdraw voting rights in the event that those limits are exceeded, and there must be provisions which permit enforcement by way of a mandatory sale of those securities or a mandatory repurchase or redemption of securities in excess of the 10 per cent or 25 per cent limits.

Turning then finally to Bill 6, we would like to make two general submissions with respect to Bill 6 and with respect to amendments which we feel should be included in this proposed legislation. First of all, we would note that section 42, which is the provision which specifically contemplates constrained shares in the bill, does not permit the imposition of constrained share conditions by a corporation which proposes to use such conditions in order to qualify under a bylaw of a self-regulatory body such as the Toronto Stock Exchange. Section 42 is specifically limited to corporations which are imposing those in order to qualify under acts of the federal or provincial authorities. I will come back to that in a moment.

The second general submission is that there is no statutory scheme which puts in place, for purposes of the Toronto Stock Exchange bylaw, the kind of surveillance and policing mechanisms which are necessary in order to comply with that bylaw and thereby enable a corporation to issue its shares to the public. I would like to deal with each of those two points separately.

The first point, the point that section 42 does not permit the imposition of constrained share conditions, in the circumstances I believe is dealt with in some material which appeared, I guess within the last day, and I am not too sure at what stage that is.

Mr. Chairman: These are amendments that are proposed?

Mr. Wilton-Siegel: Yes.

Mr. Mitchell: Do you have the proposed amendments?

Mr. Wilton-Siegel: I have something which runs, I guess, about 25 pages and appears to be proposed amendments. You have the same material.

Mr. Chairman: You will see section 42 in there, on about page five or six.

Mr. Wilton-Siegel: I have had an opportunity very briefly to review the material, and I think it answers in section 42(2)(c) the sorts of concerns that we had on this point. I think there were

one or two small drafting points but it is not appropriate to make those comments in this forum.

Mr. Chairman: Not at this point. That will come in clause by clause, the punctuation, et cetera.

Mr. Wilton-Siegel: We are not proposing to bury ourselves in that sort of material at this stage.

Mr. Breithaupt: But you are ready to do it tomorrow, are you?

Mr. Wilton-Siegel: We would be ready under any circumstance.

Mr. Breithaupt: Will you be here tomorrow? We will be doing it tomorrow.

Mr. Wilton-Siegel: Yes, if tomorrow is the appropriate time we would be quite pleased to appear.

Mr. Chairman: Yes, we will be proceeding with clause by clause, presumably not this afternoon, presumably tomorrow morning.

Mr. Wilton-Siegel: The second more fundamental point, in our opinion, the present statutory scheme, and I would broaden my comments to say the statutory scheme taking into account the proposed amendments, does not deal directly with the brokerage community's problem that there be a statutory mechanism which enables them to fulfil the requirements of the TSE bylaw and go forward with the issue of securities.

I have referred to the three provisions in the CBCA which commended themselves to us as a start and I gather, on a review of these proposed amendments, that those have been incorporated but that they do not go beyond corporations which are using those provisions for purposes related, for example, to the national energy program. Specifically, they would appear to catch corporations that are described generally in subsection 42(2)(d) but they do not extend to corporations in 42(2)(c), the brokerage industry in general.

In the absence of such an amendment and in view of the fact the Canada Business Corporations Act does not so distinguish, I suppose the CBCA remains a substantially more desired vehicle for brokerage firms proposing to go public.

There are two other comments I would like to make which represent two additional features of the statutory scheme which we would propose be inserted to deal with our specific problems. They relate, first, to provisions constraining the exercise of votes in the event that the 10 per cent or 25 per cent thresholds are exceeded and mandatory repurchase provisions.

As to the first, I would point out the Canada Business Corporations Act, in its equivalent of section 42, permits the corporate authorities to deal specifically with voting rights by way of regulation in the event that the thresholds are exceeded. In

regulations passed under the Canada Business Corporations Act there is a provision to the effect that no person shall exercise voting rights with respect to shares held by a person whose shareholdings exceeds the threshold.

As we read the statute, there is no provision in the amendments or in the proposed bill which permits a corporation to include such provisions in its articles and there does not appear to be any provision in the proposed Ontario Business Corporations Act which would permit this matter to be dealt with as it is under the Canada Business Corporations Act by way of regulation.

As the matter is specifically addressed in the Toronto Stock Exchange bylaw and as it is in that bylaw a requirement that there be such mechanisms in place, the Canada Business Corporations Act in that respect remains a more attractive vehicle in that respect for brokerage firms intending to go public

The second point relating to mandatory repurchases I should explain is also contemplated by the Toronto Stock Exchange bylaw as a policing mechanism, the thought being that in addition to compelling a shareholder whose shares exceed the limit to sell, it is appropriate for a corporation to be in a position as an alternative to compel that shareholder to sell his shares back to the corporation.

There may be a distinction to be drawn between public brokerage firms and corporations which have constrained their shares for NEP or similar purposes, in that oil and gas companies may well be participants in a market which is substantially broader from the investor point of view. In the absence of any experience it is hard to say what the extent of trading will be in public brokerage firms, but it might well be anticipated that these shares will be thinly traded, at least initially, and a mandatory sale requirement would not represent a sufficiently compelling leasing mechanism. The shareholder may be compelled to sell his shares but there may be no purchaser.

2:40 p.m.

In those circumstances, the Toronto Stock Exchange members have thought it appropriate to provide that there be an alternative available to the corporation by way of a compulsory purchase of those shares in order to put the corporation back on side.

Mr. Chairman: Mr. Howard, did you wish to respond to that or make a comment at this time?

Mr. Howard: Yes. When the industry and the stock exchange had their meetings with the securities commission on this proposal that corporate registrants under the act would be going public, it came to my attention in a newspaper report that some amendments to the Business Corporations Act might be required. I approached Mr. Bailey who was the counsel for the TSE at the time and Henry Knowles, the chairman of the securities commission. I believe it was you, Mr. Siegel, who kindly provided me with a copy of the industry's study.

I discussed with Mr. Knowles my relatively minor amendment to section 42 to provide for restriction of the issue, transfer or ownership of shares with a view to assisting the corporate registrant going public. There are certain consequential minor amendments throughout the bill and this was quite satisfactory at the time. Shortly thereafter, in further discussions with Henry Knowles, it came to my attention that my opposite number in Ottawa was heavily engaged in amendments to the Canada Business Corporations Act in connection with the national energy program.

Fred Sparling, the corporations branch director there, agreed that counsel in Toronto retained by his department and Energy, Mines and Resources would make available to us their amendments. But these amendments are directed basically to assisting the energy resource corporation in Canada and here in our proposed amendments in Ontario to take advantage of the benefits and grants under the national energy program.

There has been no discussion with Henry Knowles or the commission on making such amendments extend to the corporate registrant under the Securities Act or to members of the Toronto Stock Exchange. Before I would be prepared to recommend to the minister such amendments, I should discuss them with Henry Knowles and we work out some satisfactory amendments so that we would go together to the minister with the recommendations.

What I am saying is that I cannot unilaterally at this point recommend to the minister or his parliamentary assistant that we make such amendments extend to the corporate registrant under the Securities Act.

Mr. Chairman: Had you completed your overall comments at that point?

Mr. Wilton-Siegel: Yes, except by way of a short conclusion which I propose to make. That is little more than to summarize the comments I have made.

In view of Mr. Howard's comments, I think I should say that the Toronto Stock Exchange would be happy to participate to the extent that it is appropriate to assist Mr. Howard and Mr. Knowles in arriving at amendments that specifically address the problems of the brokerage community. In our view, as the bill is currently proposed, it does not specifically address those problems. As I say, I think it is deficient in at least three respects.

The compliance and surveillance mechanisms which are introduced, as Mr. Howard says, as a result of the federal thinking in the national energy program area, are not in the proposed amendments made available to brokerage firms. In addition, there is no provision which restricts voting rights in the event thresholds are exceeded as currently is provided by way of regulation in the Canada Business Corporations Act. Finally, there is no provision, I must admit, in either the Canada Business Corporations Act or in the proposed Ontario act which permits mandatory repurchase of shares by a brokerage firm in circumstances in which the thresholds have been exceeded.

Mr. Renwick: Granted the need that Mr. Howard has to consult with Mr. Knowles before they decide on recommendations to the minister, what sort of time are we talking about? To what extent is that an obstacle to getting the amendment settled and agreed, if they are necessary and advisable, which I am not speaking to at this point?

If these amendments are necessary, that is the enforcement ones and the sales ones or the restriction on the voting rights of shares, what is the problem? How long will it take, considering that this bill will not see the light of day in the assembly until what, some time in March?

Mr. Howard: Yes.

Mr. Renwick: Probably later than that. It will in all likelihood go into committee of the whole House. What is the time period that we are talking about if it is decided to recommend these amendments? I emphasize the "if."

Mr. Howard: I had not contemplated the other amendments--a lot of the rules will not affect the Toronto Stock Exchange until after this bill is in place in law. You understand, Mr. Renwick, the amendments that we are proposing in connection with the national energy program for very extraordinary powers that we are giving to the business corporations--

Mr. Renwick: We are not dealing with that.

Mr. Howard: Yes, we are, Mr. Renwick; with great respect we are.

Mr. Renwick: Mr. Howard, let me please clarify what I am trying to say, and I do not want to go into the other field. We are going to be dealing shortly with the substance of the extraordinary powers which are going to be necessary if our act is to comply with the requirements of the national energy program as far as Ontario companies qualifying are concerned. That was not my question.

Forget the national energy program. And I recognize that you have recognized the legitimacy of limiting to a specified level the ownership of shares of companies for the purposes of the Securities Act and the registration of membership in the exchange in Ontario. If we are treating only that question, you have said that it would now be necessary for you to consult with Mr. Knowles about two aspects presently contained for restraining corporations, as I understand it, in the Canada Business Corporations Act or in the regulations under it.

There are two specific points that I understand. A suggestion has been made that we should consider amending and providing the same provisions here. You interjected to say that you would have to consult. My question is are we talking about you consulting in order that you can make your recommendations to the minister, so that the minister can decide before this bill passes committee of the whole House in the session which will come up in March or April? Are you intending to deal with it in that time period one way or another?

2:50 p.m.

Mr. Howard: No.

Mr. Renwick: That is what I thought you were saying.

My next question is, why won't you?

I mean that's what I was getting at. I sensed the obstacle, Mr. Howard. All I am saying is, if it makes sense for us to enact this provision, which is section 42(2)(c) in the proposed amendment, surely we should be dealing with the consequential need that has been raised before us by the representative, Mr. Wilton-Siegel for the exchange.

Mr. Howard: I quite agree, Mr. Renwick. All I am saying is that this overture of the exchange to have for the corporate registrars, under the Securities Act, the same extraordinary powers that we propose to give to the energy resource corporation is something new to me and to Mr. Knowles. In fairness to Mr. Knowles and the minister, I cannot sit in here now saying, "Oh, we are going to have all this done within a matter of weeks, or two months, or three months or six months." In fairness, I would have to discuss it with them, and they would have some say as to the time frame. I can't commit myself or the ministry.

Mr. Renwick: I am not asking you to. I am asking whether or not you were going to treat it as a matter of sufficient importance that you would consult Mr. Knowles as promptly as possible since this whole question of offerings to the public by securities dealers has been up and around for a long period of time.

We are being asked to approve a part of it. As I understand it, there are two consequential changes relating to two obvious matters which should be dealt with here, and all I am asking is, are you going to consult Mr. Knowles this week, next week, during the month of January, during the month of February, or are you saying to us that in some distant future date these points may be dealt with?

Mr. Howard: I will attempt to meet with Mr. Knowles at our earliest convenience, but I cannot say when. It may not be very kind to the representatives of the Toronto Stock Exchange to be blunt, but in my own view, the industry going public hasn't the same priority or urgency as this national energy program, and our attention has been directed to the NEP.

It is only just within the last few days that it came to my attention that the promoters of industry going public wanted the same extraordinary powers. I am simply saying that this is going to have to be discussed with the securities commission and I am not rushing into it. There are other priorities at the moment. It may not be an easy matter to get the extraordinary remedies through that we want to get through because they have only come up now as proposed amendments.

Mr. Spensieri: The Canadian statute appears preferable because of certain technical features that it has. I am wondering whether it wouldn't be preferable, in any event, because of the nature of the operation of public brokerage firms, and whether we may not be worrying about something which is not going to pass. That is to say, if it comes to pass that public brokerage firms want to operate, they would prefer the Canadian statute, in any event.

Do you think that would be a fair assessment because of the nature of their operations?

Mr. Wilton-Siegel: Mr. Spensieri, I suppose I should make several comments. One is to mention that I believe Mr. Rene Sorell of McCarthy and McCarthy, who are acting on behalf of one of the member dealers that chooses to go public, is here and he will be shortly making a further statement. It might be appropriate to ask that question of him in view of his experience. Of course, each case is different and I am not sure that anyone can make a statement today as to what any particular registrant proposes to do tomorrow.

On the other hand, most of the national brokerage firms in the country have their headquarters in Toronto and substantially all their head office facilities are run out of Toronto. In those circumstances and also in view of the fact that this matter with securities generally is a matter of provincial rather than federal legislation, it has always been considered appropriate to look seriously at a provincial incorporation, particularly incorporation under the Ontario Business Corporations Act. So the federal nature of their activities is perhaps less important for brokerage firms than it may be for some other national enterprise.

Mr. Chairman: Thank you, are there any other comments?

Mr. Mitchell: I just want to make you aware that the point Mr. Howard has made, his whole direction has been to work within the new proposals under the national energy policy. He cannot commit himself, in fact, to having any further amendments ready at the time that this will go back to the Legislature and, as Mr. Renwick has said, probably to the committee of the whole House.

He has indicated that he will be meeting with Mr. Knowles as soon as possible but I can honestly say that I do not expect that we will have any further amendments ready at the time that this is returned to the House. It may be but I doubt that very much. The likelihood of that--

Mr. Wilton-Siegel: I understand, sir. I would just like to reiterate that to the extent that the participation of representatives of the Toronto Stock Exchange might, in some way, assist that, we would of course be ready and able--ready and willing--leave ability out of this--to do so, whether it be with Mr. Knowles or Mr. Howard or both.

Mr. Mitchell: Thank you.

Mr. Chairman: Thank you. If there are no other questions, we are having a presentation next by Mr. Sorell and then Mr. Coombs--he may be taking part in the clause by clause. So if you are interested or concerned with the clause by clause you might have a representative here to assist the committee.

Mr. Wilton-Siegel: Thank you, Mr. Chairman.

Mr. Chairman: Thank you very much for your presentation. Is Mr. Sorell here? Do you have a prepared brief?

Mr. Sorell: I do. I have only eight copies. Will that be sufficient?

Mr. Chairman: How many? Eight. We can get more made.

Mr. Renwick: Mr. Chairman, I noticed Mr. Wilton-Siegel was reading from a statement. I wonder if it would be possible for copies of that statement to be made for the benefit of the committee?

Mr. Chairman: Mr. Wilton-Siegel, do you have something that is photostatable?

Mr. Wilton-Siegel: Mr. Chairman, I have some rather rough notes that I would prefer to have an opportunity to quickly revise. Perhaps I might do that and have them delivered to the committee members tomorrow morning.

Mr. Renwick: That would be fine.

Mr. Chairman: Yes, thank you. Fine, will you carry on, Mr. Sorell?

Mr. Sorell: Just to introduce myself. My name is Rene Sorell. I am a solicitor with McCarthy and McCarthy. We act for Midland-Doherty Limited, which announced in November 1980 that it wanted to become a public investment dealer whose shares were owned by the members of the public. There are none at the moment in Canada.

3 p.m.

My submission will be very brief indeed because I do not want to go over the same ground that Mr. Wilton-Siegel covered. Part of the first page of my submission, which is just in point form, reviews the steps and the regulatory response that we have been engaged in in this process since November 1980. It has gone through a lot of committee work within the industry and there has been a lot of contact with the Ontario Securities Commission and with representatives of the self-regulatory body.

Basically, the deal which Midland-Doherty announced in November 1980 contemplates an exchange of currently held shares of Midland-Doherty which are held by officers and executives of Midland-Doherty for treasury shares of another company, and the result of the transaction in the end will be that the current operating company of Midland-Doherty, the company that currently

holds the registration, will indirectly be held by the public. I do not think the details of that are strictly relevant for the considerations that are before you. I am pleased to elaborate on them for anybody who is interested.

I think what is of moment here is the connection between Bill 6 and the transaction we are contemplating and that other investment dealers interested in going public in the future may be contemplating. In the material we have been working on for several months, we have always taken it for granted, because we saw no other avenue available, that it would be necessary to have Midland-Doherty Limited, which is currently an Ontario corporation and has always found it convenient to be an Ontario corporation and is operated out of Toronto, to be continued under the Canada Business Corporations Act. Midland-Doherty itself would not be continued, but the company that is going to be issuing the publicly held shares would be.

The principal reason for causing that company to be continued would be so that we would have in place a comprehensive regulatory scheme which would enable us to introduce the constrained share provisions that the Toronto Stock Exchange bylaw, which was just explained to you, and which other exchange bylaws will impose on us. The CBCA provisions appeal to us because they were detailed and gave us the assurance we needed.

The important message that I am here to deliver today is that if Ontario law were appropriately amended in a timely fashion, Midland-Doherty would certainly consider favourably omitting that step which requires shareholder approval, a lot of expense, and only seemed appropriate because the Canada Business Corporations Act was the only one that seemed to offer this comprehensive mechanism.

We have had an opportunity briefly to review section 42 and some of the amendments that were proposed to it, but not the amendments that you referred to earlier, so I cannot speak to those. Generally speaking, we have a number of suggestions, should these amendments be proceeded with.

We think it is not sufficient that section 42 contemplate restrictions on ownership and issue and transfer. We think, in view of provisions such as those the Toronto Stock Exchange has introduced, which require a comprehensive scheme of legally enforceable rules and regulations, that publicly held registrants would have a lot of confidence and would gain confidence if they could rely on a comprehensive scheme for corporate governance, that they would like to know, I think, a little more than section 42, as amended in the version I last saw, has to offer them.

In particular, we have had an opportunity to look at some of the proposed amendments to the Canada Business Corporations Act in the discussion paper for the Energy Security Act, and those have been gone into, I think, in previous discussions. Midland-Doherty believes it is extremely important that the two novel provisions that are introduced, in our view, in the Energy Security Act, find their way into the Ontario Business Corporations Act before it will be appealing as a vehicle for publicly owned registrants.

One is that a corporation that is subject to constrained shares have in its charter legally enforceable provisions enabling it to hold shares that are either already issued or are to be issued to bring the corporation as a whole within nonresident ownership thresholds or other thresholds imposed by self-regulatory bodies.

We think it is crucial there be provisions to permit sales of excess securities or securities that, once sold, will bring a corporation back into compliance with limits and thresholds that are imposed in the constraints, and finally, we think that a bit more comprehensive scheme such as that now found in section 168 of the Canada Business Corporations Act and the regulations is desirable in the sense that it spells out the framework that publicly owned registrants will need to assure themselves that simply by amending their charter in a particular way they will be putting in legally enforceable provisions of the kind contemplated by the Toronto Stock Exchange bylaw.

The only other comment I would make is that, in the process of going through the regulatory steps, we have consulted with various levels of government, including Mr. Sparling. The consultations were primarily conducted through the other registrants proposing to be publicly held. Our understanding is that federal changes have not been made in part because there was some concern about the national energy program and that was immediately before them.

But certainly there was an awareness in our previous informal discussions at the federal level about the importance of this for our purposes, on the assumption we were going to continue under the federal jurisdiction. Again, if it were possible to remain in Ontario, I think that would be appealing to my client. Those are my remarks, Mr. Chairman.

Mr. Chairman: Mr. Howard, do you have any response to any portions of that?

Mr. Howard: Mr. Sorell, I can add very little to what I said to Mr. Wilton-Siegel. I am only recently aware of the depths of the industry concerned going public in this area. I think I am safe in speaking for Mr. Knowles when I say that we will get together and, of course, we will look to the advisers of industry to assist us in any proposals necessary to bring the Business Corporations Act into line.

In listening to you, I am getting the impression that we will have to deal with the industry corporate registrant as a separate part in the Business Corporations Act or in the Business Corporations Act in the future. I cannot promise anything immediate. Even if these NEP amendments go ahead, they may not become law until perhaps a little short of a year after the bill passes third reading. We have to allow lead time for the exposure of very extensive regulations so that the regulations and the act will come into force concurrently. So I am afraid we cannot offer you any hope of immediate assistance in your problem.

Mr. Renwick: I sensed what was happening and I am very upset and concerned about it, that we should have a specific instance of the concern I expressed a few minutes ago, that is, the failure of the government to be able to respond promptly either yes or no to a very legitimate request in connection with consequential amendments to the proposed amendments to section 42(2)(c). It will simply mean the Ontario corporation will have to take the corporate procedures to become subject to the jurisdiction of the Canada Business Corporations Act.

3:10 p.m.

I cannot understand the rigidity of the ministry on this point of concern. I am a great person for trying to find the middle ground and I have not looked at them for quite a considerable period of time, but we did in special statutes restrict the rights of certain shares, the Ontario incorporated trust companies, and there was some kind of a periodicals act which had a restriction. My recollection is that there are some enforcement or compliance provisions in those. I may be quite wrong. They may have simply imposed the restrictions and not provided enforcement or compliance provisions.

I can well understand the ministry's, Mr. Howard's, particular reluctance to extend the more draconian provisions of the national energy policy that are only being considered in its first implications, and we are going to have enough trouble with that. It may be possible, if my recollection is right, that in a periodicals act or in a trust companies act we imposed restriction to protect the Canadianization of Ontario incorporated trust companies and periodicals.

I think we may have got enforcement or some kind of compliance provisions in there and such compliance provisions would be a lot easier for this committee to deal with in your special situation, if we had already had Ontario statutes which had them, rather than going the further step of these perhaps more thoroughgoing but at least difficult provisions that Mr. Coombs has alluded to and which Mr. Howard, quite rightly, has concerns about.

Perhaps either Mr. Howard or Mr. Wells will recall whether under our trust companies act or--what was the periodicals one? I think it is under the jurisdiction of your ministry. There are restrictions on the transfer of shares and I think there were compliance provisions in those for the trust companies similar, presumably, to the federal trust company one, but we extended it to these periodicals that were in Ontario. Maybe it would be worth looking at as at least a halfway house that might meet your requirements.

Mr. Spensieri: I just wanted to ask Mr. Sorell: You have indicated that if this Legislature accommodates by coming up very quickly with that legislation, both in the area of constraint and of policing, then you will favourably consider going Ontarian. My question is really, aside from the obvious benefits to your client of staying Ontarian, and the cost, say, of the federal, what would be the loss or what would be the initiative if we were to say that this entire area of the publicly held investment dealers should

remain in the federal area, should stay out of the Ontario statute? Do you see any dire consequences to the people of Ontario one way or the other?

Mr. Sorell: I suppose I have a little difficulty with the suggestion that it should remain federal because, if anything, especially in Ontario, it has shown itself to be provincial in the whole area of securities regulation.

Mr. Spensieri: But surely, the incorporating jurisdiction has no real relevance as to what the conduct of it is going to be.

Mr. Sorell: It does in this case because the feature that the federal statute has to offer us is necessary to implement the important provincial policy, in effect, because the specialized tribunal that the Legislature has given the authority of public registrants to has approved or expressed no objection to the Toronto Stock Exchange bylaw that requires that this occur, and the export from this jurisdiction of Midland-Doherty, for example, is only being necessitated to accommodate basically local and provincial policy. We are going to a jurisdiction that offers us the technical basis for doing what we understand to be the policy of the specialized tribunal that governs registrants and important registrants like Midland-Doherty.

Mr. Renwick: That's the anomaly of it. That's the ridiculous part about it. It is an Ontario company involved with the exchange and the Securities Act. Those are all Ontario matters that permit them to develop a process by which they can offer the shares to the public but we happen to say to the company that is incorporated in Ontario: "We will not amend our corporations act to deal with the matter. You better go somewhere else where you can find the facility. If you can find it at Ottawa, fine, if you can find it somewhere else, fine. You can come back in the other way." That is the anomaly and that is why it is so ridiculous for the ministry to be this rigid on a very proper and appropriate matter for consideration.

Mr. Spensieri: No matter how accommodating we were to be in the whole matter of business operations, we would almost always see publicly held investment dealers incorporate charitable, simply because they are going to comply with other self-regulating bodies throughout Canada and it has always been the preference of a business enterprise doing business on a Canadian scale to incorporate under the federal jurisdiction. It seems to me that we may be worrying a great deal about something which as a matter of practice will not come to pass.

Mr. Sorell: May I comment on that? I have a little difficulty with that too. It is true that large registrants like Midland-Doherty or any other large investment dealers have to cope with a lot of different regulations, but they are primarily those of other provinces and incorporating federally does not materially assist them in their day-to-day operations. They have to address different provincial requirements and primarily provincial requirements in other provinces.

The reason it is particularly appropriate in policy terms in our view why they should remain in Ontario, why the Ontario act should at least offer an accommodation in this technical area, is because Ontario is the leader in all securities regulations and the pattern in the long process that led up to the acceptance of the public ownership idea has been one in which Ontario has always led, has always developed the first bylaws and legislation, and the other provinces have willingly announced their intention to adopt them without significant change.

I guess it is the same comment I made earlier, that you keep on being driven in the direction of Ontario whenever you talk about securities regulations. The rules still emanate from this jurisdiction.

Mr. Spensieri: Would you anticipate the need for extraprovincial licences or that sort of thing?

Mr. Sorell: The point is that all those qualifications are already in place for our company and you would not need anything further. A new entity is deciding to go public.

Mr. Spensieri: Would it be able to operate Canada wide and list on the Vancouver Stock Exchange or whatever?

Mr. Sorell: Sure.

Mr. Chairman: Those appear to be the questions and the comments of Mr. Sorell. Since we have over an hour remaining, is it the wish of the committee to commence the first noncontroversial areas of clause by clause or should we start tomorrow morning?

Mr. Renwick: I think I would like to hear further from Mr. Coombs on the national energy matter. Without pretending to start to go through the amendments clause by clause, it does seem to me that this committee has to understand and at least have some discussion about those other clauses, that is the fundamental nature of the changes we are being asked to consider. If we get it mixed up with a seriatim, clause by clause discussion, we will not understand it.

3:20 p.m.

That is setting aside entirely the question of whether the committee need bother anyway, because with the drive towards uniformity coupled with the rigidity of the minister, I wonder whether it is worth the committee's while doing other than to report the bill now, with or without the amendments, and let the government move the amendments in committee of the whole House and vote them through. Because to be faced in a committee with the suggestion that no matter what happens we will be faced with one of two arguments, that it is uniformity in the first place or that we will not make the changes in any event, in the second place, it seems to me we could perhaps save the government a little bit of money by reporting the bill today.

Mr. Chairman: Does the parliamentary assistant wish to respond to that?

Mr. Mitchell: If I may, Mr. Chairman. I wish to assure Mr. Renwick it is not a case of the ministry being rigid. I think what Mr. Howard attempted to point out was the time limitations in attempting to resolve those concerns that have been expressed by Mr. Sorell and, before him, Mr. Wilton-Siegel of the Toronto Stock Exchange, in pointing out that albeit he is going to be meeting with Mr. Knowles as soon as humanly possible, he would be less than honest if he said there is any way the changes that might arrive out of those meetings can be ready for the return of this bill to the Legislature.

Apart from that, I quite agree with you, I would like to hear the balance of the comments you have asked Mr. Coombs to make. I should point out that Mr. Howard was in the office at 5:30 this morning in response to concerns that have been raised here by other delegations, particularly I guess with regard to section 147 and others. He was in the office at 5:30 this morning drafting some other changes that might be introduced.

So it is not a case of the ministry not trying to respond to concerns raised, but rather, as Mr. Howard has clearly pointed out, we are aiming to try to bring this bill firstly in line with the national energy policy. I think that has been clearly stated from the beginning. I think it was clearly stated, too, when the bill was introduced in the House. I stand to be corrected, but I think at the time it was introduced in the House it was pointed out that we were trying to bring our bill in uniformity with the Canada Business Corporations Act and with those of other provinces.

Undoubtedly, I guess as well Mr. Howard has pointed out that this bill, even once it has gone through the House, will not become law, I think he said, for something--

Mr. Howard: Another year.

Mr. Mitchell: --within the period of say the next year, and perhaps at that time, and I am not completely up on rules of procedure, but the results of the meetings with Mr. Knowles and others may have reached resolution and there may be some changes able to be put forward within that time frame.

Mr. Renwick: I wanted to respond briefly on two points. I was not being facetious when I said that there is no point in committees of this Legislature sitting on bills of this kind of detail without any openness with respect to the discussions about them. We might as well just accept the fact that we are simply here to rubber stamp what has been before us. There is obviously interbusiness-government communication to facilitate the drafting of the bill which is acceptable, but to be faced with this constant business that we have discussed it with everybody--for the Institute of Chartered Accountants to come yesterday and say that they are totally happy with the whole of the bill in every respect except one simply means that there is no discussion in the public on matters related to significant relationships with financial matters.

I am delighted at least that the bar association at this time was able to come forward and able to spend the time with us to help

us not only understand the implications but to point out even in a limited role that there are two sides to many of these questions.

The third thing is that this province, whether anybody understands it or not, has provided the leadership in corporate and security law from day one in the country. If you want to abdicate that leadership, that is fine. Let us do it. Let us say, every time they amend the Income Tax Act of Canada, we will amend the Income Tax Act of Ontario. Every time they amend the Canada Business Corporations Act, we shall amend the Ontario one. Let us abdicate the securities field to them. Let us do that.

I do not mind if that is the conscious decision of the assembly. But for us to abdicate the leadership which we have always had in this field seems to me to be a very short-sighted policy, both from the point of view of Ontario and from that of Canada as a whole because this is where the leadership has come from. The leadership has not come from the federal level, and the reason we are being asked to conform our act to the federal one on the national energy policy is because that is a national policy.

This is not related. The amendments we are being asked to deal with are not related to the national energy policy. They are a general application and we have to understand that. If you want to come in here with amendments to deal with the national energy policy, come in with a separate bill and limit it to the national energy policy. But you know as well as I do that we have not thought out the implications of what we are being asked to enact in this special field, let alone in a number of other areas.

You saw the impossibility of having any discussion this morning on matters which at least deserve some give and take. But no, every time a question is raised, it is either uniformity or it has already been discussed or, "In any event, we are not going to make any changes because we have not got the time."

I have gone on at some length, but I want to come back to a simple point. I tried to point out, as you, as the parliamentary assistant, Mr. Mitchell, have pointed out, that it is going to be some time before this bill becomes law, presumably the sooner the better. But I know as well as anybody else does that, by the time you get the regulations drafted and all of the other things done and the Lieutenant Governor's proclamation to bring it into effect, it is going to be some months from now.

Therefore, it does not matter a good God-damn whether this bill is dealt with in committee of the whole House in March, April, May or June. This is January 5.

There seems to me to have been a reasonable request that, if we are going to enact a portion of the provision with respect to the security dealers in this bill, we should at least have the capacity to deal with the two consequential requirements, at least to say we will consider them and yes, we will enact them, or no, we will not enact them.

But to indicate that no, a company which has been in business

here and a number of others which have had their origin in Ontario--I do not make any sentimental plea for a company, they can go through whatever corporate gymnastics they want to--but to say that it is the policy of the government of Ontario for securities dealers to go public, it has been a matter of public debate and consideration, and everything is now being done, and an Ontario company comes to us and says, "Well, we want to be able to do it," and we say, "Oh no, you can't do it because we haven't got the time." You have got the time. All you need is the will.

It is just that simple. Between now and June, you could make the decision as to whether you are going to amend this bill to meet the two legitimate consequential amendments one way or another with respect to the securities dealers, which, in my judgement, are just as important in the long run as having to kowtow to the federal government on its national energy program, just as important.

You can do it within six months. You can do it within five months. You can come into the House and the committee of the whole and say, "Yes, we've agreed" or "No, we haven't." That is all I am saying to the committee. But I would seriously consider whether or not we are wasting our time here.

Mr. Mitchell: In response, Mr. Renwick, in fact it was following your line of thinking that I had attempted to respond to you. I am certainly not able to argue with the points you have raised.

As I can reiterate once more, Mr. Howard has said that he will be meeting with Mr. Knowles as soon as possible. But to say that they will be ready at the time of the bill going back to the House is something I cannot personally promise.

Mr. Renwick: I am not asking for a promise.

3:30 p.m.

Mr. Mitchell: That meeting with Mr. Knowles will be held. In fact, it was clearly pointed out that the Toronto Stock Exchange representatives and Mr. Sorell as well, I would presume, would be polled with regard to the concerns they have raised.

Mr. Eaton: Mr. Renwick is suggesting that we do not proceed at all with clause by clause. That would be impractical. There are a lot of amendments that have been put before the committee where we have had an opportunity to see whether we can get them done. We can clear them up tomorrow in clause by clause. Like any other bill, when it does go back to the House when the House is sitting in March or April, if it comes up then, or if it takes a little longer, maybe even in May, then those amendments can be brought before the House in committee of the whole House and we can deal with those amendments at that time.

In the meantime, we can get this group of amendments that have been brought in cleared up and looked after. If there are certain sections we may want to deal with in the next day, we can set them down till the end of the day. I think you indicated there are a couple you had to work at. We could be prepared to deal with

them that way, but we can follow through now and get to that stage at least by the end of tomorrow. Then they will be prepared to be dealt with later on.

Mr. Chairman: Is it the wish of the committee to carry on with Mr. Coombs' comments with regard to these amendments at this time?

Mr. Coombs: Yes.

Mr. Mitchell: That would appear to be the direction of the committee.

Mr. Chairman: Mr. Coombs, could you please assist us?

You all should have a copy of the reorganized, if I could call it that, amendments to the bill.

Mr. Coombs, were you going to start out with those sections and go through those sections that you had pointed out to Mr. Renwick? Was that your intention?

Mr. Coombs: That was my intention.

Mr. Chairman: Section 5 would be the first. Am I correct?

Mr. Coombs: That is correct.

What I am going to do is to proceed with these in numerical order, if that is acceptable, rather than in some other logical order. I think it would probably be just as easy for you to follow, and it is certainly going to be easier than flipping around among these pages.

Mr. Eaton: As I understand it, these are just to be comments on the clauses. Maybe we would be able to take a look at them tonight and maybe there will be some amendments suggested that we can discuss tomorrow in clause by clause.

Mr. Coombs: I really see my role as giving enough background so that people can sensibly read them and so that when you get to your clause by clause discussion, you will have a better understanding.

Mr. Eaton: You don't have any suggested changes to them particularly?

Mr. Coombs: No.

Mr. Chairman: Carry on. The amendment you are addressing to is section 5.

Mr. Coombs: Section 5 of the bill, as it now stands, is the section that prescribes the matters which must be included in the articles of incorporation. Section 5(1)(d), as it is presently drafted, simply says, "if the right to transfer shares of the corporation is to be restricted, a statement that the right to transfer shares is restricted and the nature of the restriction."

All that has happened here is that the word "transfer" has been expanded so that it is "issue, transfer or ownership." That is essentially just to meet the NEP point.

The next amendment is section 29. Section 29 is the provision of the bill which now deals with the circumstances in which a corporation may hold shares in itself. The amendments that have been proposed to the bill in respect to section 29 are the ones you see here, 4 to 8. They deal with the second of the two changes I mentioned to you earlier.

They set up this regime whereby a corporation may hold shares in itself for up to two years without cancelling them, convert them into restricted shares and then resell them. It is drafted so that it is restricted to corporations which have restricted their shares for NEP purposes.

Note in the third line of subsection 4, where it says, "A corporation may, for the purpose of assisting the corporation or any of its affiliates or associates to qualify under any prescribed act of Canada," there is latitude there for, by regulation, listing the statutes which are the ones will have to be met.

That latitude is there because we are not completely certain yet exactly what legislation they are going to want to comply with. Presumably there won't be too many more statutes emanating from Ottawa on this but there is quite a bundle at the moment that are being proposed.

Mr. Hebb: If I could just interject, it is the ministry's intention, as I understand it, to confine the prescription to the federal statutes that are related to the NEP.

Mr. Coombs: When you go on to the subsection 5 of section--

Mr. Renwick: Before you leave that point, because these words are going to crop up again and again in there, why was it decided to go this route, because of course as long as you use the term prescribed it is wide open to go far beyond at any point the national energy program? In other words this is general legislation. Why was it decided to go this general route rather than to limit this particular provision to the national energy program?

Mr. Coombs: For federal purposes, I would guess it was because they wanted additional flexibility. This language has been taken, as you are aware, from the language in the Energy Security Act. The primary object, as I understand it, that the federal drafters have had is to draft for NEP purposes. But when the drafting process began in Consumer and Corporate Affairs federally, they had no clear idea of where Energy, Mines and Resources was going to go with its legislation; whether it was going to be one act, two acts, three acts and so on.

Once they got into that business of saying, "We are going to have to have some flexibility there to prescribe statutes" it was thought or presumed that as much flexibility as possible would be

desirable. It is more a drafting shorthand than anything else. There was the fear that to draft more restrictively might narrow the operation of the legislation unduly, requiring further amendment at a later date.

Mr. Hebb: I could add to that even now we are in a position federally where the energy security bill, which contains the bulk of the statutes that are involved in the national energy program, has not yet received first reading. It was released by way of an exposure draft last year. It will receive first reading in Parliament only after Parliament resumes in late January.

It may well be, however, that by March or April when the Ontario Legislature comes to consider this act by way of third reading we would have a handle on what the precise federal statutes are. I think the real answer, as Morris has said, is that this has been drafted at a time when the other elements of the national energy program are still in the process of being developed.

Mr. Coombs: There is a further point, that to narrow this kind of drafting to say specific reference to the national energy program, from your context may appear to you to be rather peculiar that in a provincial statute you have a reference not to a law or regulation of the federal Parliament but to a policy of the federal government, which policy may not be their policy or their successor's policy or whatever, a year or so from now. The problem we face from a drafting perspective is the rather amorphous nature of what we are trying to draft into at the federal level.

3:40 p.m.

Mr. Renwick: My second concern, if I may, concerns the prescribing. If this appears in the Ontario act and it appears in the Canadian Business Corporations Act, who does the prescribing of other jurisdiction ordinances or provisions? Ontario is not perhaps at this particular point in time a good example when we are speaking of the oil and gas industry, but I assume that there are--

Perhaps I have already conveyed my confusion as to what I am trying to say. What will we be prescribing under--

Mr. Coombs: The term "prescribed" is defined in paragraph 21 of section 1(1) of the bill. It means prescribed by the regulation, so the prescribing is going to be done by the Ontario minister. The Ontario minister will presumably look at whatever federal legislation there is and perhaps, if there is better legislation or another territory's ordinance or whatever that would also provide benefits to a corporation of this nature, he might wish to prescribe those as being statutes by which an Ontario corporation could restrict the sale of its shares.

In other words, if an Ontario corporation could obtain a benefit from, say, the BC government by restricting its shares in some way and going to BC operators, they should be--

Mr. Renwick: That is my point. I was trying to get some sense of what that regulation would cover. So the Ontario act would likely end up with a prescription by way of regulation of whatever

the federal statutes are which deal with the national energy program, together with whatever other provisions of Alberta or ordinances of the Yukon or the Northwest Territories that might be applicable. So the word "prescribed" qualifies all of the types of acts or ordinances that can be passed. Is that correct?

Mr. Coombs: Correct.

Mr. Renwick: So Ontario could by itself under this provide an incentive similarly.

Mr. Coombs: If Ontario were to enact legislation to provide such incentives, it could then prescribe that statute under this legislation and (inaudible) would then be permitted in order to qualify for the Ontario grants. Am I responding to you?

Mr. Renwick: In other words if Ontario were providing funds to Chrysler Canada they could use this procedure for requiring the pay level of Canadian ownership if Chrysler Canada happened to be an Ontario corporation.

Mr. Coombs: Where the incentives, or whatever, were geared to attaining or maintaining a specified level of Canadian ownership or control--if the restrictions related to something other than that sort of concept--this would not be an appropriate provision.

Mr. MacQuarrie: It was indicated that the federal legislation in respect of the national energy program was still evolving. What about the Energy Security Act and the ramifications of that act? Is there anything unusual about that?

Mr. Coombs: The Energy Security Act, as I understand it, is in fact something of an omnibus bill. It has provisions of its own, and it also provides almost as a schedule or appendices to it, the additional statutes that are going to be required to set up the PIP program and the (inaudible) to be established.

Mr. MacQuarrie: If the PIP legislation is to tie in with the national energy program, how would that particular statute link in with this one?

Mr. Coombs: If, as and when that statute is enacted, there will come into being two or three new federal statutes. I believe there are also one or two existing federal statutes which will also be relevant, so you will have a list of five statutes at the federal level that you will want to tie this into. It will be necessary for the minister to prescribe in the regulations under the Ontario act, but for the purposes of 29(4), (a), (b), (c) and (d) are the prescribed standards, so that there is going to have to be that sort of regulatory step to bring this in.

Mr. MacQuarrie: By regulation then.

Interjection.

Mr. MacQuarrie: It struck me as a very complicated,

complex sort of program, and we do not know really what its final shape is going to be.

Mr. Howard: Mr. MacQuarrie has raised a question of the Energy Security Act of Canada. If you would, Mr. Coombs, clarify if I am correct or not that the proposed amendments to the Canada Business Corporations Act are under the umbrella of the Energy Security Act?

Mr. Coombs: They are indeed part of that statute.

Mr. Chairman: Would you carry on. You were in the midst of section 29, I believe, when we--

Mr. MacQuarrie: Sorry.

Mr. Chairman: No, no, not at all. It is just that the chair lost grasp of where we were. You were in the middle of 29, were you not?

Mr. Coombs: That is correct. If we can leave 29(4)--unless you want me to expand further on its language, although that may be more appropriate tomorrow--29(5) is the subsection which restricts what the corporation can do with these shares once it has purchased them and got them into its own hands. It would be futile and it would perhaps give some leeway for market manipulation if the corporation could simply buy in shares for the purpose of Canadianizing itself, do nothing with them in the way of restricting them, sell them out again into the hands of essentially the same body of potential shareholders as it had begun with.

It was felt necessary to include the provision in 29(5) in order to make the corporation, when it does sell those shares out again, sell them to people who will enhance its Canadianized position. So simply buying them from they know not whom and selling them back to they know not whom is not what is contemplated. The object of buying them in and then reselling them is to improve its Canadian status, not simply to let it play with its shares.

Mr. Renwick: Why then do you nullify subsection 5 by subsection 7?

Mr. Coombs: Subsection 7 is there in order not to introduce into the public capital market the possibility that there will be shares whose chain of title is tainted in some way. So that if you buy a share on the exchange you will not have to worry about whether the person selling it to you had the title.

Mr. Spensieri: (Inaudible) not be changed by the fact that it did not achieve its Canadianization objectives? In effect you are penalizing the market buyer in any event, if it turns out there is a contravention.

Mr. Coombs: That is to an extent true, but the corporation's object is going to be to continue trying to enhance the value of its shares in that market. It is inherent in this whole program that there is going to be some interference in the capital market in relation to the shares of Canadian energy

corporations. The objective of many of these clauses is to make that interference as slight as possible, but I think you have to recognize that we are doing something pretty fundamental and pretty basic to the market in the shares of energy corporations in this country, not just here but federally.

3:50 p.m.

Mr. Renwick: Let me for a moment try to forget the national energy program and talk about it in the general sense of a corporate act. Subsection 5 says that a corporation shall not transfer shares held under subsection 4 to any person unless a certain condition is met, and that prohibition is quite clear. The shares which it cannot transfer are those they are holding which are not restricted for any purpose. Yet, under subsection 7, they can transfer those shares again, and that's fine.

What I am saying, and I think perhaps the member for Yorkview (Mr. Spensieri) was headed into it, is why isn't there an obligation if they pick up the shares and hold them to convert them into restricted shares?

Mr. Coombs: That is in part, sir, because of the two-year limitation on the holding and the vagaries of the capital market. It may be that a corporation will engage in a program of buying up these shares and it won't be able, because of a thin market or whatever, to buy up enough of them to warrant a fresh public issue. But it faces the fact that it is now holding those shares and at the end of two years if it doesn't get rid of them, it is going to have them cancelled. When they are cancelled, there are going to be some severe effects possibly on its balance sheet.

We have tried to give the flexibility to the corporation, if it finds itself in that position, to find itself a suitable Canadian owner who is willing to take the shares from it and within the two-year period sell the shares out to that person.

Mr. Renwick: I can understand that, but why doesn't it say so?

Mr. Coombs: I thought it was implicit in these provisions that that was permitted.

Mr. Renwick: I suppose I am only talking about the inconsistency of holding shares under item 4(a), and then being told in item 5 that you can't sell them unless it is for achieving the purpose set out in subsection 4. Then you were explaining that at the end of two years if they can't achieve the purpose, they can transfer the shares and that, in any event, whether they abide by the limitation on subsection 5 or not really doesn't matter because any transfer is not going to be void or voidable in any sense.

Mr. Coombs: The transfer is not going to be voidable. There is, however, a penalty that can be imposed on the corporation for breaching subsection 5.

Mr. Renwick: Where would that be?

Mr. Howard: Section 256.

Mr. Chairman: Section 256, as amended.

Mr. Renwick: Given my scepticism about this government ever levying any penalty on any company for contravention of the Business Corporations Act, I can well understand that it is consistent to have it in here. I certainly will be glad to attend the first trial that is held, if I am still alive.

Mr. Laughren: Could I have a supplementary?

Mr. Chairman: Certainly, Mr. Laughren.

Mr. Laughren: I am a little confused about the difference in the shares that the company goes out and purchases. For example, if they were held by US citizens as part of this Canadianization process for the two-year period, is it not also possible that during this two-year period they would be held within the treasury or would they become almost like treasury shares within the corporation?

Mr. Coombs: In essence, it is an adoption of the US concept of the treasury shares.

Mr. Laughren: If at the end of the two-year period, according to section 29(5), what if there are other so-called treasury shares held by the company that were not purchased for the purpose of Canadianization but were just there? Are there also restrictions on the sale of those?

Mr. Coombs: Under this corporate regime and this bill, there are no other such shares, but this is a very new concept. Business corporations of this type when they purchase their shares are normally required to do one of two things depending upon whether they have an open or closed capital limit: Either to cancel the shares or to restore the shares to the status of authorized but unissued shares. Normally, except for a number of exceptions that are already in section 29 of this bill, the purchase by a corporation of its shares leads to those results. There is not in the scheme of this bill any other concept of treasury shares than this one.

Mr. Chairman: Mr. Coombs, you are saying there is no concept of suspension like there is in the present act and fractional shares where you hold in suspension which are not back in treasury. They are issued but they are not back in treasury. There is no such concept under the new act, is that so?

Mr. Coombs: Except for the exceptions I mentioned to section 29 which are already here.

Mr. Hebb: If you look at Bill 6 as now printed, subsections 1, 2 and 3 represent existing exceptions of a similar nature.

Mr. Spensieri: By not making the transaction void or voidable, do you not see a danger that a very widely held

corporation could decide under the guise of the Canadianization program to go out and purchase these widely scattered shares and to then say, "Well, the heck with it, we are not going to qualify for Canadianization anyway, so let's at least sell them to a group of very preferred class of shareholders?" Thereby, you sort of reclaim a public corporation back into the hands of a few people. Has that been given any thought at all?

Mr. Coombs: Yes, it has. There is a potential for that kind of occurrence. However, if you look closely at the drafting of subsection 4, you will see that the corporation, when it purchases the shares, must have the requisite purpose. In other words, it must have formed the purpose of attempting to Canadianize itself.

Mr. Spensieri: The intent. Isn't that all there is really?

Mr. Coombs: For an improper use of this section there would of course be the penalty provision that Mr. Renwick has just mentioned. There would also arise things like the oppression remedy which is contemplated under the statute. That kind of activity would be pretty clearly oppressive of the other shareholders. This is not all going to be done in the dark and secretly. Various security commissions and security exchange commissions in the jurisdictions concerned are going to be interested in a corporation that is in the market to buy its own shares. It will be disclosed that this is going on. In fact, I suspect the larger the company the more concerned the board of directors is going to be about whether it has gone through the requisite considerations to decide to do this.

There is also this quite severe--and I should not underemphasize this--result that if they buy in the shares and don't dispose of them in some way before the end of that two-year period, they are going to damage the corporation's financial appearance. They are going to reduce its capital and its dividend paying account. A corporation is not willingly going to engage in this kind of activity unless it has a pretty clear idea of what it is going to do with the shares in that two-year period.

Mr. Spensieri: Well, they will dispose of them. All I am saying is there may be a pre-arranged market for them.

Mr. Coombs: It's possible. I would never let a client do it.

4 p.m.

Mr. Renwick: My last question simply is do I take it that that conversion under item (b) is simply a straight unilateral right on the part of the corporation to convert those shares without any reference to other holders of those shares?

Mr. Coombs: The conversion right will have to be one which has been given to the shareholders of the free shares of the class. When we got on into the amending provisions, the fundamental change provisions to which amendments are also proposed, the mechanism by which a corporation will be able, for example, to confer this conversion right on its common shares as a class is

specifically dealt with. Certain reductions of shareholders' rights in that regard are contemplated.

For example, take a corporation which has only a class of common shares outstanding and it wishes to Canadianize in this way, what it would do would be, first, to create a new class of shares restricted as to issue transfer of ownership. It would also give to the common shareholders as a class the right to convert from their existing common shares into shares of that class.

That is not necessarily going to be an attractive right to the shareholders. It will not be a detriment to them either, but it will not be an attractive right. You will not find too many shareholders who will want, in the early stages of this program, to transfer their interest from a free share to a restricted share because they will be going from a relatively large market for their share to a smaller market for their share. So that conversion right is principally going to be of interest only to the corporation for this purpose.

Having done that, the corporation will then be in a position to go out in the market place, find free shares that are available for sale, purchase them, convert them using that conversion right which would be available to any holder of those shares, accumulate enough shares to do an adequate distribution and do the distribution.

Mr. Renwick: So the right to convert would have to attach to all the shares of that particular class--

Mr. Coombs: The free class.

Mr. Renwick: --as a condition, a preference or a right of those shares.

Mr. Coombs: Exactly.

Mr. Renwick: And it is only in accordance with that conversion right that they can carry out the step under item (b).

Mr. Coombs: Yes. When this provision was originally being drafted, the deliberate policy step was taken to decide that the conversion should not be a unilateral thing available only to the corporation. It should be a class right available to all of the holders for what it is worth to them.

Mr. Chairman: Do you have a further comment to make on section 29, Mr. Coombs?

Mr. Coombs: I would point out that section 29(8) which you will find here is really just a reproduction of the old subsection 4 of Bill 6. It has simply been moved down to subsection 8. It is simply renumbered.

Section 35(1) does not contain much other than of a technical interest. There has been some clarification of its language and some conforming with language generally with these other provisions we are talking about.

Section 35(7)(b) is the section which introduces the two-year rule. Section 35 generally, if you look at it, is the section which deals with how the stated capital account of the corporation is affected on the purchase or other acquisition of shares by the corporation.

Subsection 7 says that for the purposes of that section which describes this adjustment to stated capital, "a corporation holding shares in itself as permitted by subsection 29(1) and (2) is deemed not to have purchased, redeemed or otherwise acquired the shares."

Section 29(1) and 29(2) are provisions that are already in the act. Clause (b), however, is this new one which refers to 29(4)(a) and effectively puts on the two-year rule by saying that when you acquire shares under 29(4)(a) you are deemed not to have purchased, redeemed or otherwise acquired them, but any of the shares that are held by the corporation at the end of two years and any shares into which they have been converted shall be deemed to have been acquired at the expiration of the two years. So if the corporation has still got either free shares that it purchased or any shares into which they have been converted at the end of two years from the date of the original acquisition, it is as if they had then acquired them at the end of the two years.

Mr. Renwick: What are the consequences of that?

Mr. Coombs: Then you go back into the existing provisions of section 35 in Bill 6 which prescribe for the reduction of the stated capital account.

Mr. Renwick: You come back into what has been the normal process with respect to such shares then?

Mr. Coombs: Yes. I might mention, by the way, that the two-year period was selected in order to give a corporation sufficient time to acquire enough shares and then to put a public offering of those shares together, so that within that period they could have purchase enough shares to warrant a public offering in effect, get the public offering done and get the shares out again.

A longer period would really give too much leeway for the misuse; a shorter period would not give enough time to accomplish that.

The next section is section 42.

Mr. Renwick: Is that just a draftsman's technique of expressing it, or was there some problem in expressing it in some other way? Is that just--

Mr. Coombs: It is really necessitated by having to draft into the existing provisions of section 35--

Mr. Renwick: That seemed to be the simplest way, with the fewest words, to get it back into section 35.

Mr. Coombs: Anything else on 35?

Mr. Renwick: But that is all that happens then. All right, I think I understand.

Mr. Coombs: The object of the provision really is to make it possible to Canadianize these corporations as quickly as possible. This provision is really an adjunct to the power to create new classes of restricted shares and offer them to the public directly. Not all corporations will want to take advantage of this.

There are amendments to section 42 which really extend section 42 as it presently appears in Bill 6. Section 42 now talks about restrictions on transfer and is preserved by this amendment. New paragraphs (c) and (d), however, have been added to subsection 2 to provide in (c) for the investment dealer restrictions that you were discussing earlier and in (d) the NEP restrictions that are really the principal thrust of this body of amendments.

Section 42(3) of--

Mr. Renwick: There seems to be some repetition. Is there any repetition? The grafting on of (c) and (d) seem to me to leave some area of overlap with (a) and (b). I suppose it does not matter a great deal.

Mr. Hebb: That is a fair comment. Clauses (c) and (d) were tailored for these specific situations, and for ownership of the investment industry. Certainly they do in a general way come within (a) and (b) and yet there was a concern that (a) and (b) were not framed sufficiently broadly to embrace them.

4:10 p.m.

Mr. Renwick: I think the other point I make out is that the magic words "Canadian corporation" in item (b) and "Canadian ownership or control," those magic words are not defined anywhere so you have to look to some other statute to find those words used in order to key into this particular clause, I assume.

Mr. Coombs: Personally, I am not entirely sure what would now fall under the--I am sure there must be some. This is language, I think, from the old act.

Mr. Hebb: Yes, sections 42(a) and (b) are identical with section 47(2) (a) and (b) of the existing Business Corporations Act. They have not been changed.

Mr. Spensieri: Would it be in the Income Tax Act, or how do you define it?

Mr. Hebb: I am guessing here. I was speculating as to what (b) would mean. The existing (a) talks about "obtaining, holding or renewal of authority to engage in any activity necessary to its undertaking." You could think of a broadcasting station, for instance, as requiring authority to engage in an activity falling within (a).

Mr. Renwick: That is no problem.

Mr. Hebb: Then (b) talks about "the purpose of achieving or preserving its status as a Canadian corporation." I do not know whether the Ontario government has provided subsidies, for instance, to the publishing industry. Might they look at something like that in connection with that type of thing, a subsidy type of arrangement?

Mr. Renwick: Somehow or other, somebody is going to have to define it. That term, Canadian corporation, is going to have to be picked up somewhere in some other statute to have any meaning to it, because "its status as a Canadian corporation," certainly an Ontario business corporation presumably has a status as a Canadian corporation by virtue of the fact that it is incorporated under the Business Corporations Act of Ontario, in a broad sense, I suppose. Those will become terms of definition at some point in other statutes. I guess you are going to have to look for them.

Mr. Hebb: I think you are right in the broad sense, but I am sure the intention was, and I guess you agree, that to refer to another statute that said such and such would happen in the case of an Ontario incorporated corporation or a federally incorporated corporation.

Mr. Spensieri: It is Canadian resident corporation as defined, I believe, is it not? Would that be the intent, a residency test?

Mr. Hebb: Yes, it is defined in the existing Business Corporations Act for the purpose of directorship qualifications.

Mr. Spensieri: This is not the same?

Mr. Hebb: No, I think it is a different term.

Mr. Howard: Mr. Chairman and gentlemen, in drafting section 42 and in drafting all these new provisions to deal with the industry ownership and the NEP, I thought the simplest approach was to simply add on to the existing provisions, so I left (a) and (b) as they are in the current act. Perhaps Mr. Renwick or Mr. Breithaupt could explain why they were in there, because I do not know. Mr. Salter was executive director, along with Ken Young, at the time that the current Business Corporations Act was enacted, and they are not available. Mr. Young has retired and Mr. Salter is incapacitated and laid up until some time in February.

Mr. Renwick: I am only going by recollection and I believe it to be accurate. As you probably know, every 10 years in Canada there is some concern about Canadian nationality, and in 1968, 1969 and 1970 that was again up front and we had that select committee on cultural and economic nationalism, the select committee of the assembly.

It was around that time the Business Corporations Act came through. It was with that kind of thought, because we had also at that time, as I say, imposed those restrictions on Ontario incorporated trust companies and I think on that strange business of the periodicals or whatever the hell that statute was. It was with that kind of Canadian sense in mind that those were put in. I

do not know to what extent actually any Ontario company ever used them; they may very well have.

Mr. Howard: It would be a simple matter to take them out, Mr. Renwick, but I could not see any point. Of course, along with what you are saying, there is the requirement that the majority of the board of directors be resident Canadians. This has a great significance and has had.

Mr. Coombs: I think one thing you could bear in mind when looking at these provisions in section 42 is that generally for a private corporation you can have any restriction on transfer and, with the amendment to 5(1)(d), on issue, transfer or ownership of shares that your corporate draftsman can conceive of. The point about 32(2) is that these are the only restrictions that a public offering corporation can have. So they are really pertinent just to the public offering corporation.

You may want to turn your attention to 42(3). Section 42(3) in the federal draft emanating from a desire on the part of the federal authorities to ensure that there wasn't excessive latitude in imposing these restrictions, that in effect the restrictions could not be used in order to restrict the ownership of shares by Canadians indirectly. You might concede that under the guise of national energy program restrictions the clever corporate lawyer would think of a restriction which would not only limit the ownership of shares of the corporation by foreigners, but incidentally also the ownership of shares by legitimate Canadians. The object of 42(3) is to prevent that abuse of the provision.

Going on to the new section 44(a), you will see that this section appears as a new part of the statute. That is because it sets up this peculiar and extraordinary remedy that the corporation has to enforce its constraint regime. It seems to have sufficient importance that it should be set off on its own. It does not naturally fit under any other part of the act. It might look like a subsidiary to existing provisions of those parts. This gives it a highlighting and a significance in the whole scheme of the act which you might think it deserves.

It attempts to set up the basic bones, the structure of the mechanism by which a corporation, when it does its examination of its shareholders to determine what their core is for the purposes of reporting to the petroleum monitoring agency, will discover that there are people who are what I would call offside shareholders, who have acquired these restricted shares perhaps for speculative or other purposes but whose ownership of the shares is going to put the corporation's status under the NEP in doubt.

In 44(a)(1) the corporation is given the authority to sell those shares as if it were the owner of the shares. It is a novel concept. The corporation will in effect be able to go into the market and sell the shares of an existing shareholder as if it owned them. Thereafter, that shareholder will have no right except to receive, subject to the following provisions, the net proceeds of the sale. He will have been turned from being a shareholder of the corporation into being a person having a right to recover money from the corporation.

In 44(a)(2): "The directors of the corporation are required to select shares which are to be sold for this purpose in good faith and in a manner that is not unfairly prejudicial to and does not unfairly disregard the interest of the holders of the shares in the restricted class or series taken as a whole."

4:20 p.m.

That language is a little difficult to get your tongue and your mind around initially. What it is talking about is that there may be, for example, a holder of a large block of shares of the corporation who does not have the requisite Canadian ownership rate. There may also be a number of much smaller holders of shares of the corporation who also do not have the requisite COR.

In those circumstances it may be fairer to the shareholder group as a whole, not to go out and pick up the individual shares of the smaller holders and try to sell them out but to go to the holder of the large block and say: "Look, you are messing up our COR. We are going to have to sell off for you or you will have to sell off for yourself unless you want us to do it, some proportion of your holdings to bring your COR back on side."

It is thought that the directors need that degree of flexibility in order to be fair to the shareholders. The reason for this language about good faith and unfairly prejudicial and unfair disregarding and so on is to first off make the directors think about whether they are behaving properly when they do that, and second, to feed the oppression remedy, if you will. If the directors decide that not only is there this offside shareholder out there but it would be convenient to get rid of him because he has been a difficult corporate member, they may think twice about whether they should sell him and make certain that they have adopted the correct procedure in deciding who they are going to sell off and that they are not doing it for an improper purpose.

Mr. Chairman: Mr. Coombs, you call this novel; is it not a complete reversal of the philosophy in the past? When for example there were shares to be redeemed, et cetera, the principle under the current Business Corporations Act was that there would be by lot or by some manner of redemption or cancellation or whatever that was entirely impartial.

Mr. Coombs: That is correct.

Mr. Chairman: That was the philosophy. Now is this not a 180-degree reversal in philosophy?

Mr. Coombs: This is very different from that approach. It may be that a corporation will wish, in effect, to adopt one of those existing procedures in deciding what shares will be sold off. But to make those determinations by lot does not fit very well with the way the COR determinations operate.

It may be, for example, that you have two offside shareholders, one of whom has a 75 per cent COR. So if you are trying to achieve an 80 per cent COR to get your grants and you have two offside shareholders--one with a 75 per cent COR and one

with a 20 per cent COR--you might wish to decide that you will only sell off their share proportionately. You will probably have to sell off more shares of each individual than you might otherwise have to just to achieve the requisite COR if their holdings were more equal in the COR sense.

But in any event you will get a fairer approach possibly and a more immediate and effective approach with the sale of fewer shares with less disruption of market if you can say, "The guy with the 75 per cent COR is not badly affecting us. The guy with the 30 per cent COR is way off side. So we will decide as directors, acting in good faith"--and so on. But it is the guy with the 30 per cent COR that they are after.

It looks a little draconian and I suppose it is. But if you have to work by lot you are going to be picking up not only those two holders but perhaps a whole group of other much smaller holders who may have small blocks of shares, and whose shares, if you are going to deal with them on the lot basis on some proportionate basis, pro rata basis, will take somebody with a block of 100 shares, say, and will finish up with 77.5 shares.

It just is not an approach that seems to work well within the COR program as a whole. You have got to keep bearing in mind, too, I suggest, that an outside holder of these shares is going to know perfectly well that he has got an animal that is subject to this policing mechanism. He will have bought the shares knowing that he was buying in a situation where he was liable to be sold out, but he is not the sort of person the corporation contemplates that it wants as a holder of those shares. Presumably he is looking for some kind of short swing profit.

I suspect it will be the exceptional case where you will find holders of that nature who now hold the shares where the shares are by amendment subjected to these restrictions, so that he has started off with one species of property and he has finished up with a different species that is subject to this remedy. It is much more likely that you are going to be dealing with shares that have been created out of a whole cloth sold into the market of restricted shares.

Mr. Chairman: Thank you.

We are pushing 4:30 p.m. May I have the direction of the committee as to how we proceed from this point? We have not completed Mr. Coombs's observations on the remainder of the sections which he referred to; in fact I suspect we are not a half way through them. Yet it was contemplated that clause-by-clause consideration would start tomorrow morning.

Mr. Renwick, for example, do you have any comment as to the procedure? Do we start right off with clause by clause tomorrow morning at 10 o'clock?

Mr. Renwick: I think that Mr. Coombs, in his opening remarks, said that there were two fundamental questions, and I think you have dealt with both of them. We have not quite finished

the second one. If I could have your indulgence, I should like to ask one or two questions of what remains on this section 449(a). Then I think we would be prepared to start in with clause-by-clause tomorrow morning.

Mr. Hebb: Mr. Chairman, I wonder if I could ask a question. You will recall yesterday morning, my colleague Brian Levitt had not completed his general comments on the act. At such time as we moved on to the accountants, we were going to comment on perhaps another seven, eight, nine or 10 sections. We would be quite prepared to do that if it would be in order, if appropriate, in light of what has happened in the interim in the course of your clause by clause discussion. I just wanted to bring that back on the table.

Mr. Renwick: I wish to express my appreciation to Mr. Hebb and his colleagues for being with us, and I am glad you are going to stay with us. But I think it might be better if we did deal with it clause by clause tomorrow.

Mr. Chairman: Do you wish to ask those questions tonight, or first thing tomorrow morning?

Mr. Renwick: No, right now, so that we could start in at the clause by clause process tomorrow.

What happens? The shares which you are talking about here are the shares held contrary to the restrictions; that is, by nonCanadians, if that is what we are talking about.

What is your guess as to what will happen to these shares so far as the US is concerned? I assume they will become pretty nonsaleable in the US, would they not? The moment a corporation added these restrictions into its shares--I am thinking not so much of an Ontario corporation, although it may be an example of that--there must be a number of Canadian ones that are traded in the US. The moment they add these restrictions presumably there will be serious problems with say the New York or the American exchanges.

4:30 p.m.

Mr. Coombs: A number of corporations of that nature spring to mind. The likely result of the corporation with only one class of shares that puts a restriction of this nature on them, where those shares trade both in the US and in Canada, is that the shares will, first, become unsaleable on the US market because there won't be anybody interested in buying them except for very short-swing profits.

Second, it's entirely conceivable that the US exchange or the US Securities Exchange Commission will simply say, "If that's the game you are playing, you don't even qualify to be sold down here." A more likely occurrence for some of these corporations, I suspect, will be that where they have a class of shares now in place and those shares are currently sold on US exchanges and Canadian exchanges, those shares will continue to trade and, indeed, may

have more and more interesting market activity than restricted shares.

The corporation, in an attempt to Canadianize, will create a new class of restricted shares which it will offer on Canadian exchanges. Those shares will trade here in Canada. They will have to be designed to be shares that are sufficiently attractive, I assume, to make the brokerage community happy with selling them. They would have to be convinced that they can find a market for them before they do the issuing.

At the same time, presumably, that kind of corporation would also be attempting to use section 29 to bring in some of the US shares and convert them into these new restricted shares and put those into the Canadian market. The object of doing that, of course, is to make the corporation a more profitable vehicle because it is going to get the benefit of all these grants and incentives under the federal program.

On the one hand, there will be this dampening effect on the market, but at the same time the corporation will be able to earn more money so the shares will become more attractive in another sense. I couldn't predict for you what the market effect of any of that is going to be, but that is the kind of scenario I see for that kind of company.

Mr. Renwick: With a company with shares that are at present traded on a number of exchanges in the US and then had these restrictions added to them, we could very well see that the shares held in Canada would become significantly enhanced in price.

Mr. Coombs: That is possible. I suspect we aren't going to see too many corporations impose restrictions by amendment to existing classes. On any proposal to amend in that fashion, the US shareholders or whatever other foreign shareholders there were would be entitled to vote in respect of that fundamental change to the provisions pertaining to their class of shares.

They could argue perhaps even further on the basis of some common law principles that exist outside of this legislation that as a group of foreign shareholders who are peculiarly affected by this change, they should be entitled not merely to vote in their formal class but also to vote as a (inaudible) as to whether they should accept this, and that, in fact, the change shouldn't go through without that.

I wouldn't like to put that forward as a concrete possibility but it certainly sounds arguable. It is going to be very hard, I suspect, if we have a corporation with a COR problem, to amend an existing class.

Mr. Renwick: When do you anticipate the Canada Business Corporations Act will be amended?

Mr. Coombs: From what I read in the newspapers, I would think it will have some priority in the upcoming sitting of the Parliament of Canada.

Mr. Renwick: The new session. Is this a matter which is has received comment in the States?

Mr. Coombs: These provisions specifically?

Mr. Renwick: Yes. What is happening here.

Mr. Coombs: I haven't seen anything, and I suspect it is because there is not yet a general awareness of the way the regime is going to operate down in the US. There have been comments in the US financial press about the NEP and its significance. When the Dome Canada shares, for example, were issued they were subject to restrictions very similar to a lot of these things.

Mr. Hebb: We do know Ottawa has received very little in the way of comment on the corresponding provisions in the Canada Business Corporations Act which were contained in the disclosure draft of the energy security bill, but I suspect that is because it is contained in the middle of a huge bill and has just been overlooked so far.

Mr. Chairman: Mr. Coombs, you mentioned you didn't think there would be an amendment of the articles to place these restrictions in existing classes of shares that are issued already. I take it you were therefore implying there would be new classes set up, but is that not the same result, just one extra step?

Mr. Coombs: Yes and no. Yes, because there will be this new class of shares which will trade only in Canada. You have to take into account, however, there will be a lot of Canadian shareholders who would rather not own one of these Canadianized shares. They would much prefer to have a share that they can sell on any of three or four markets, instead of just one or two, instead of just to people with adequate COR.

The investor and the investing public generally are going to have to be wooed, I suppose, by corporations that want to do this by being offered shares which have a preferential dividend. The possibilities are legion. In order to sell shares of that nature, they have to be made look attractive in a financial sense. I haven't really thought through how that will be done, but there will still remain a market in the US shares, the pre-shares that are tradeable in the US.

Mr. Chairman: A fact which may be enhanced if there is a new class put up there so that you are not going to have any buy-outs of the "free shares." They will be enhanced once the corporation becomes eligible for the federal dollar. Is that correct?

Mr. Coombs: Right.

Mr. Renwick: Have there been any significant objections from the other provinces to enacting this kind of legislation?

Mr. Coombs: I am not aware of any other province that has thought of it. I believe the new Alberta Business Corporations Act

will not contain provisions comparable to this. When they see Ontario looking at them, they may decide it is not a bad idea.

Mr. Renwick: So Ontario is the only jurisdiction at the present time that is considering it?

Mr. Coombs: The only one I know of.

Mr. Renwick: That is consistent with the relationship between the Premier and the Prime Minister.

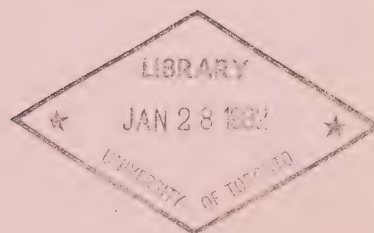
The committee adjourned at 4:40 p.m.

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BUSINESS CORPORATIONS ACT

THURSDAY, JANUARY 7, 1982

Morning sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Treleaven, R. L. (Oxford PC)
Andrewes, P. W. (Lincoln PC)
Breithaupt, J. R. (Kitchener L)
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Gordon, J. K. (Sudbury PC)
Laughren, F. (Nickel Belt NDP)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Piché, R. L. (Cochrane North PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M. A. (Yorkview L)

Substitutions:

Hennessy, M. (Fort William PC) for Mr. Andrewes
Kolyn, A. (Lakeshore PC) for Mr. Piché

Clerk pro tem: Nokes, F.

From the Ministry of Consumer and Commercial Relations:

Howard, B. C., Executive Director, Companies Division
Mitchell, R. C., Parliamentary Assistant
Wells, E. J. K., Director, Company Law Branch

From the Ministry of the Attorney General:

Yurkow, R., Legislative Counsel

Witnesses:

Knight, D., Chairman, Corporation and Securities Law Committee,
Institute of Chartered Accountants of Ontario

From the Canadian Bar Association Committee on Bill 6:

Coombs, M.
Hebb, L.
Westlake, B.

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Thursday, January 7, 1982

The committee met at 10:15 a.m. in committee room No. 1.

BUSINESS CORPORATIONS ACT
(continued)

Resuming the adjourned consideration of Bill 6, An Act to revise the Business Corporations Act.

Mr. Chairman: Gentlemen, we have a quorum in place. May we proceed with clause by clause, starting at section 1? Mr. Mitchell is here both as a member of this committee and as the parliamentary assistant. Is it the wish of the committee that he move the amendments? Are there any objections from the Liberals or NDP on that?

Mr. Renwick: Are there any objections from his colleagues in the Conservative Party?

Mr. Laughren: They are more apt to object than we are.

Mr. Elston: Those members who are here might have some objections.

Mr. Chairman: I am sure the whip has them right outside the door in the phone booth.

Mr. Mitchell: Perhaps before we begin, I might beg your indulgence to ask a question with regard to the motions. All of them have been tabled and some of them are quite lengthy amendments. Can they be taken as read in the cases where they are extremely long?

Mr. Chairman: As circulated, do you mean?

Mr. Mitchell: Yes.

Mr. Elston: We can't table things here. I think they have to be introduced on the record.

Mr. Mitchell: I intend to introduce them as motions.

Mr. Elston: I think they have to be read. At least that is the way I understand this to have worked before.

Mr. Chairman: Yes. I think you will get your practice reading them.

Gentlemen, it has been pointed out to me that the amendments which Mr. Mitchell will be reading are a cleaned-up version basically of what we already received yesterday. His have certain typographical errors taken out. It is basically that. There might

be other small changes with regard to the cleanup. Mr. Mitchell does not know where his copy has been cleaned up.

Mr. Mitchell: They are typo errors.

Mr. Chairman: If it hits you as you go along, you can stop him at that point. I am also advised that there will be further amendments coming later today with regard to the national energy program, which I believe is as a result of certain discussions which took place this morning. We are going to get photocopies distributed now of the latest corrected cleaned-up set. We will distribute those just as soon as we can.

On section 1:

Mr. Chairman: Mr. Mitchell, I believe you have an amendment to move on section 1.

Mr. Renwick: Just for simple guidance, I have nine amendments here with copies for members of the committee. The first amendment which I have is to section 20.

Mr. Mitchell: We have some amendments to section 20 as well.

Mr. Renwick: What I would like to know is, could the staff of the committee sort these into bundles for each member and distribute them so that the members would have them? I have two or three others which will come along later on.

Mr. Mitchell: Might I add a comment to Mr. Renwick's?

Mr. Renwick: I had made a dozen. I hope that is enough. If it is not enough, maybe you could make some more.

Mr. Mitchell: Mr. Renwick, we ourselves will have some amendments to propose to section 20 in the light of the discussion that has gone on.

Mr. Chairman: I just received also some amendments from Mr. Spensieri. We are getting deluged with paper here, which we had better sort out. Gentlemen, please bear with us while we sort them out and get them in order.

Mr. Mitchell: Mr. Chairman, with the number of motions that are forthcoming, and since we are going to be going into clause by clause, perhaps it would be prudent to adjourn the meeting for a short period of time to get these all copied. I think they should be in front of us.

Clerk of the Committee: I do not want to be away when you start. I want to be sitting down here.

Mr. Mitchell: That is just the point I was making.

Mr. Chairman: We can perhaps deal with the amended section 1. May Mr. Mitchell commence by reading the amendment to section 1?

Mr. Mitchell: Mr. Chairman, I move the following amendment to section 1: That subparagraphs i and iv of paragraph 4 of section 1(1) of the bill be struck out and the following substituted therefor:

"iii. Any trust or estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar capacity,

"iv. any relative of the person, including his spouse, where the relative has the same home as the person, or

"v. any relative of the spouse of the person where the relative has the same home as the person."

I further move that paragraph 17 of section 1 be amended by striking out "means" in the first line and inserting in lieu thereof "includes."

Mr. Chairman: Are there any comments with regard to Mr. Mitchell's amendment? If not, shall the amendment carry?

Motion agreed to.

Mr. Renwick: Mr. Chairman, on section 1, I am interested in knowing from the staff of the ministry whether there are any significant changes between the definitions included in the present Business Corporations Act and the act which is in front of us. I do not want to go through each and every one of them, but there are a number which have been dropped and a number which have been added.

I would like some explanation of those that are considered of importance. For example, the word "affairs" is defined for the first time in our act. As an example of the kind of information I would like to know, is the only place that appears in the statute in relation to the duties of the directors of the company to manage or supervise the management of the business and affairs of the company?

It is that type of information that I would like to know. I would appreciate it if the staff of the committee would run through these definitions, both in our present act and in this act, and let me know if there are any that are of any real significance. I noticed, for example, that ancient terms such as "authorized capital" have been dropped from the act. It is difficult for me, as I am sure it is for all members of the committee, to understand whether or not any of them are of any great importance or any real departure.

Mr. Mitchell: Mr. Howard, perhaps you care to respond.

Mr. Howard: I will comment with respect to one significant change, Mr. Renwick. I will leave the balance of the comments on the definitions to Mr. Wells.

Mr. Renwick: I am sorry, sir, I cannot hear you.

Mr. Howard: I am sorry. The definition of "court" in the present act is quite lengthy. This definition appeared as a result of the Kimber report, which led to the then new Securities Act and disclosure provisions in the amended Corporations Act, where it was contemplated that there would be a special court to deal with corporate and securities matters. That never materialized and in the interim a divisional court has been created in the High Court of Justice. In discussion with legislative counsel, we decided on the simple definition, "court" means the High Court of Justice.

Mr. Renwick: I have no problem with that.

Mr. Howard: It compels consequential amendments with the act.

Mr. Mitchell: Mr. Wells will go through the balance of them.

Mr. Wells: Certainly "affairs" deals with the duty of the board of directors to manage the business and affairs of the corporation.

Mr. Renwick: That is the main thrust.

Mr. Wells: The word "associate" is defined in the act again. Really, that was taken out when we got rid of insider trading and now it is put back again because it is used, I believe, in various parts of the act. "Auditor" is now included to include a partnership of auditors, so one can appoint a firm as opposed to an individual. There is no worry about whether or not you have to name a particular individual in the firm of Clarkson, Gordon or whoever it may be. "Beneficial interest" is just defined for clarity, as is a day.

Mr. Renwick: I have no problem with that.

10:30 a.m.

Mr. Wells: To continue, because I know that this concerns you, in item 23, minister means the Minister of Consumer and Commercial Relations or such other member of the executive council to whom the administration of this act is assigned. The minister remains responsible for the act in my view.

Item 25, a nonresident corporation is redefined. Under the present act it is arguable that we have been incorporating nonresident corporations within the meaning of our own statute, and the language has been cleared up to eliminate that ridiculous possibility.

Mr. Renwick: What about the definition of officer? We keep hearing now that so and so is the president and the chief executive officer. It seems to me that the chief executive officer is now a recognized office in a company. Am I correct in that?

Mr. Wells: It is a term certainly, and it is used especially in the larger public offering corporations, but usually it is tied to another position in my experience. In other words, it

is chairman and chief executive officer, president and chief executive officer or general manager and chief executive officer for that matter.

Mr. Renwick: There is no particular need to--

Mr. Wells: I do not think that is necessary.

The reference to redeemable share in item 33 is brought in, and basically that has to do with the whole changeover from the present system under the act with par value and no par value shares and authorized capital et cetera. It is more varied of course. The definition of resident Canadian is changed substantially and I do not think I need say more about that. It is just that, in essence, if you are a landed immigrant and you choose not to become a Canadian citizen after you have had the opportunity for some time, then you are not counted as a resident Canadian.

Another change is the special resolution, that is paragraph 43. You note that under the existing act a special resolution is one which is passed by the board of directors and then confirmed, with or without variation by the shareholders. The new definition does not talk about the board of directors having to pass the resolution. It is one that is done by the shareholders and that can have important ramifications if there is a proposal et cetera and the directors refuse to pass it. So it is a cleaner way of doing things. The other things are new and are varied et cetera, but I think that covers the highlights.

Mr. Renwick: What were the ones that were dropped? There is a whole series that was dropped that very few people ever understood anyway, such as basic earnings per share, fully diluted earnings per share, equity share and so on.

Mr. Wells: Under the new act, if it is deemed by this committee and by the House that it be passed, the financial reporting et cetera will go out of the act itself. The present act has reams of provisions about what has to be reported on with respect to the balance sheet, the income statement, et cetera. All of that will be moved to the regulations, and that is why this has been taken out.

Mr. Renwick: With respect to dropping the definition of equity share?

Mr. Wells: It is the same thing.

Mr. Howard: Mr. Chairman, if I may add a comment there, of course, as well as trying to be uniform with Canada, we also have to be uniform in certain areas with the Ontario Securities Act, so some of these definitions are as a result of that.

Mr. Renwick: I have no further concern about section 1.

Mr. MacQuarrie: Mr. Chairman, I tend to be one of those who believes the fewer words the better in some of these situations. I have some trouble re the "associate" as defined in paragraph 4 and "related person" as defined in paragraph 36,

particularly in view of clauses 4 and 5 of the bill, as expressed in the amendment that simply says "related person."

Really it is a question of draftsmanship, eliminating needless verbiage. The amendment that is proposed, section 1(1), paragraphs 4 and 5, deals with relatives. We have in the definition section under paragraph 36, "related person" very clearly defined. To my mind paragraphs 4 and 5 could be replaced by one simple paragraph saying, "a related person as defined in the act."

Mr. Howard: I will attempt to answer Mr. MacQuarrie. The amendment we proposed and that was just made in section 1 to "associate" was to come in line with the proposed amendment to the Securities Act. They had just exposed the proposed amendment for comment. Their comment on the reason for that was that the amendment clarifies the application of associate relationship to a relative of a person.

Just in leafing through the proposed amendments, they haven't made any change in "related person." You may be right, but it could be all--

Mr. MacQuarrie: It just struck me as the same words repeated to define essentially "associate" in one case and "related person" in another. Mind you, it is nitpicking but essentially--

Mr. Spensieri: May I speak to that point, Mr. Chairman?

Mr. Chairman: I think so, unless Mr. MacQuarrie wished to make a motion.

Mr. Spensieri: I think Mr. Howard has already touched on this but with respect to the definition of "resident Canadian," I imagine the section is really designed to take advantage of the benefits under the national energy program. I am wondering if there are any other sections which would be affected by that definition, and also what the rationale would be for insisting in a way that the sentence should be taken out after one year.

There may be a lot of valid business reasons why some Canadian residents who are lawfully entitled to be here would not want to take out citizenship even though they may be entitled to do so. I am wondering about the policy rationale on that.

Mr. Howard: The definition of "resident Canadian" is the definition that has been in the act and the bill right along. We haven't made any amendment there to accommodate the NEP. Mr. Wells may be able to comment further.

Mr. Wells: The policy behind it, which goes back before my time, is that in essence Ontario corporations could be controlled at the board level by resident Canadians and a majority of resident Canadians must be on the board of Ontario corporations and in fact must acquiesce, et cetera, in actions of the board of directors, because this is an Ontario statute, it is not a flag of convenience, et cetera. The reason is and the policy is that a majority of persons on the board of directors of an Ontario corporation must be resident Canadians as defined.

10:40 a.m.

Mr. Spensieri: But as I read the old subsection 28, it was either a Canadian citizen or a person lawfully admitted to Canada and who was ordinarily resident in Canada.

Mr. Wells: That is right.

Mr. Spensieri: Now you have the additional requirement of having to take out citizenship.

Mr. Wells: That is right, and that tracks the Canada Business Corporations Act and about four other statutes provincially.

Mr. Renwick: I thought I was finished but Mr. Spensieri raised in my mind the question, who is this strange group of Canadian citizens who are not ordinarily resident in Canada who can be members of the prescribed class and thus qualify as resident Canadians?

Mr. Wells: I imagine they are persons who may be posted overseas on government service, et cetera, military or ambassadorial or whatever.

Mr. Renwick: But they are caught by "ordinarily resident."

Mr. Wells: Not necessarily. If you will give me one moment, I will give you an example of what the federal act provides.

Under the federal regulations, in essence, it is persons who are full-time employees of the government of Canada or a province or an agency of any such government or federal or provincial crown corporation, students at universities, employees of an international association or organization of which Canada is a member, and a few others that I see you are reading as I read with you. That is the sort of thing that is contemplated.

Mr. Chairman: Are you satisfied, Mr. Renwick?

Mr. Renwick: Just a second. Okay, I am satisfied.

Mr. Chairman: Mr. Renwick, if from time to time I do interrupt you, I do have a little difficulty knowing whether your silence means you are digesting the point we are on or whether you are one section ahead of us, digesting the next one.

Section 1 agreed to.

On section 2:

Mr. Renwick: I was always interested in lore and I have always been interested in these railways, street railways and incline railways, and why the Railways Act is never consolidated and why at this late date you have decided to change the wording of section 2(2).

Mr. Howard: We did not have the problem but the Cornwall Street Railway had the problem. When they ceased to operate the street railway and wanted to become a bus company and change their name, they found there was no provision under the Railways Act to change their name and there is no provision under our act for them to change their name. Consequently, when I looked into the old Railways Act we made this amendment and the consequential amendment later on in section 166 to accommodate the Cornwall Street Railway.

Mr. Renwick: You have answered my question. I was just curious why, after all these years, you thought you had to change that strange clause. Do you know why they do not consolidate the Railways Act?

Mr. Howard: Maybe Mr. Yurkow can tell us.

Mr. Yurkow: I am sorry, I missed the point.

Mr. Chairman: Mr. Renwick's question is why they do not consolidate the Railways Act.

Mr. Renwick: It is always the Railways Act, 1950.

Mr. Yurkow: That was a decision the commissioners made, not to consolidate it, and I do not know why.

Mr. Renwick: I never understood, either.

Mr. Chairman: Any other comments with regard to section 2. Shall section 2 carry?

Section 2 agreed to.

Sections 3 and 4 agreed to.

On section 5:

Mr. Chairman: Mr. Mitchell moves that clause 5(1)(d) of the bill be struck out and the following be substituted therefor:

"If the issue, transfer or ownership of shares of the corporation is to be restricted, a statement to that effect and a statement as to the nature of the restriction."

Motion agreed to.

Section 5, as amended, agreed to.

Sections 6 to 16, inclusive, agreed to.

On section 17:

Mr. Renwick: I think we should have a comment from the ministry about the net effect of sections 17, 18 and 19.

Mr. Chairman: Mr. Wells or Mr. Howard, Mr. Renwick's question or comment asks for words of explanation regarding sections 17, 18 and 19, the indoor management provisions, et cetera.

Mr. Renwick: Section 17(1) is new, 18 is new and 19 is new. It is obviously part of the continuing wrestling with the indoor management role, I assume, but I would like to understand what its consequences are or what the intended result of the divisions are.

Mr. Howard: In reference to the studies that were prepared leading to the Canada Business Corporations Act--

10:50 a.m.

Mr. Renwick: I cannot hear you, Mr. Howard, sorry.

Mr. Howard: I am quoting now from a study of Robert Dickerson. He is referring to a similar section, which he says is new and which is based upon the draft Canada companies code. The purpose of the section is to attempt a statutory statement of the effect of the so-called rule in the Royal British Bank versus Turquand.

In terms of that decision, a person dealing with a corporation is entitled to assume that its internal procedures have been properly complied with. If a person dealing with a corporation was bound to satisfy himself that all formalities required by the corporate constitution had been properly satisfied, the efficient conduct of business would be difficult, if not impossible. The policy of the decision in Turquand's case is to relieve the outsider of any obligation to inquire whether there has been due compliance with internal procedures. That policy is embodied in this section. I hope I am discussing the section you are concerned about.

Of course, if a third person knows that there has been some internal irregularity, or in all the circumstances ought to know, he will not be entitled to claim the protection. This is catered for by the proviso, and there is a reference to the Canada subsection. It should also be noted that the section is drafted to make it clear that anyone is entitled to its protection, a matter which was unclear at common law. This is characterized as the indoor management rule.

Mr. Renwick: I would be curious to know what comments Mr. Hebb or his colleagues would like to make on it. Does this effectively forever solve the problem?

Mr. Chairman: Mr. Renwick, it went through my mind that at the same time the proposed act is dispensing with the corporate seal. It does loosen up an area there without the corporate seal and with the indoor management role.

Mr. Renwick: Perhaps Mr. Hebb would comment.

Mr. Hebb: You are speaking specifically at the moment of section 17, I take it, or are you taking 17, 18 and 19 as a package?

Mr. Renwick: Section 17(1) and sections 18 and 19.

Mr. Hebb: You will note that section 17 is drawn in part from section 16 of the present act. I probably have the wrong number because I do not have a copy of the recent revised statutes, but the present Ontario act introduced a provision in 1970 that no act of a corporation and no transfer of real or personal property is invalid by reason of the fact that the corporation was without capacity or power to do the act or make or receive the transfer.

You notice that that is effectively carried through in section 17(3). In section 18 there is a statement that no person is required to have knowledge of any documents that may be on file with the government. Then in 19 there is the statement of the indoor management role, which states to a large degree the law as to what reliance should be put on several acts of the corporation.

It is an effort, in my view, to provide greater comfort to outsiders dealing with the corporation. I suspect that most practitioners will continue to go and search the files of Queen's Park in order to be sure they know everything that is available on the public files about the company, notwithstanding that section 18 states that it is not necessary to do that.

Mr. Renwick: So any of that information which is publicly available will mean that they can search them but they are not fixed with any notice of them.

Mr. Westlake: I think it is a constructive notice.

Mr. Renwick: Or any knowledge of them.

Mr. Hebb: Obviously, if they did search them and found there was some restriction in the charter which prevented a particular transaction from going ahead, they would not be able to pretend that they were not aware of that restriction. But the intent certainly is not to require you to go to Queen's Park and do the search.

Do you want to add anything to this?

Mr. Westlake: No, other than that there are, I think, two concepts that we are struggling with here: the constructive notice doctrine, the indoor management rule generally, plus the ultra vires doctrine, which as long there is a letters patent regime which existed up to the 1970 act when there was a certain presumed power that flowed from the letters patent.

Once you went to a registration system, you lost the benefit of the royal charter having being conferred and it raised the possible question of ultra vires acts. So section 17 in particular is intended to refute the ultra vires doctrine more than the indoor management rule.

Mr. Hebb: But that, Brian, as I was indicating, is--

Mr. Westlake: In the 1971 act.

Mr. Hebb: --something we did 10 years ago.

Mr. Westlake: And it has just been carried forward.

Mr. Hebb: The other provisions, I guess, are--

Mr. Westlake: Are dealing with the alternative, the constructive notices, again taken from the CBCA.

Section 17 agreed to.

Sections 18 and 19 agreed to.

On section 20:

Mr. Mitchell: Mr. Chairman, we are going to be proposing some amendments to section 20, in the light of some concerns that have been raised by Mr. Renwick. We are also aware that Mr. Renwick has a proposed amendment to section 20. At least I am led to believe you have one. By way of explanation, the changes we are proposing are in the light of the comments that you--

Mr. Renwick: I will not move my amendment--

Mr. Mitchell: Perhaps if I--

Mr. Renwick: Move yours and if they address my points, it will be fine.

Mr. Mitchell: I move that the following clause (c) be added to subsection 1 of section 20.

Mr. Renwick: I haven't got a copy.

Mr. Mitchell: It has not been typed, Mr. Chairman.

Mr. Renwick: I think it would be more convenient if we just stood that section down until we have copies.

Mr. Mitchell: Can we defer it? All right we will have it typed and we will defer it, if we may, Mr. Chairman.

On section 21:

Mr. Chairman: Right. Shall we carry along with section 21? Can the chair raise questions or do you wish the chairman to give up the chair to address a question here? Fine.

May I address myself to the draftsman? Section 21 is generally known as a pre-incorporation contract--it does not call it that now but the pre-incorporation contract section. Is there any way--and it is a question. I find subsection 2 very loose in its beginnings.

"A corporation may, within a reasonable time after it comes into existence, by any action or conduct signifying its intention to be bound thereby, adopt"--and so on--a written or oral contract. It seems to be terribly loose with "a reasonable time" and by some action signifying the adoption.

Normally, of course, the practice is to do a formal resolution adopting, but is it possible to tighten that? I find it rather loose in asking for litigation, as to what is a reasonable time, et cetera; especially when you have an oral contract involved. Can you help me with that, members of the Canadian Bar Association?

11 a.m.

Mr. Howard: In the meantime, all I can comment, Mr. Chairman, is that again this follows word for word section 14 of CBCA. What you are suggesting may be quite reasonable but I would like to get the reaction of the members of the bar.

Mr. Chairman: Mr. Wells.

Mr. Wells: I might add too that the existing act just says a corporation may adopt a pre-incorporation contract and it doesn't mention a reasonable time at all, but by implication that's there, that it is a reasonable time in the circumstances, whatever those circumstances may be.

Mr. Chairman: Here it spells out oral. It brings in the word oral, codifying the word "oral" and so on.

Mr. Wells: In the new version, yes.

Mr. Chairman: Yes.

Mr. Wells: I find it a question of fact, really. I guess if there is a fight over it, the judge will have to decide but to lay down some kind of 10-20-30 day period, I am not sure that's a workable solution. I understand your problem but these sections have been around for a while and I don't recall seeing too much litigation on that particular point.

Mr. Chairman: Mr. Wells, times are changing and within the last year and a half there have been debenture questions and so on, that might not have been done five years ago as to adoption. It is simply something that bothered me as I went through the looseness of it. Mr. Hebb, do you have any comments?

Mr. Hebb: I guess I have some difficulty in seeing what sort of alternatives you would come up with that would provide adequate flexibility. I understand the concern and yet I think it would be better left to have each case judged by the courts on its particular facts and a decision made in appropriate case that in fact the period had been too long and therefore the benefits of the section shouldn't be taken advantage of.

Mr. Chairman: Okay. I will take that as your answer and I do understand if you do start putting in a reasonable time, such as before the next annual meeting of shareholders or something, that could work out unfairly. I just do see a tremendous loosening with the lack of a corporate seal with the indoor management rule and now with the reasonable time, oral contracts, action--I just see a great looseness and a great area for litigation.

Mr. Spensieri: Would you prefer adoption by resolution? Is that what we--

Mr. Chairman: In writing would certainly--at least there is a piece of paper of some evidence of an adoption. Mr. Wells.

Mr. Wells: If you do that, then you are taking away perhaps a doctrine of partial performance. If the corporation fails to adopt a contract in writing but then goes ahead and acts on that contract, then it may be deemed not to have adopted it and it may lose the benefits of the work put in. It is the doctrine of partial performance, I guess.

Mr. Chairman: Mr. Hebb.

Mr. Hebb: There is just one general comment I might make. One of the features of the Canada Business Corporations Act was supposed to be that it was a businessman's statute. That involved not just a lawyer's statute but that involved taking some areas that previously had just been in the case law and putting them in a statute for the first time, so that a businessman, a non-lawyer, could find out the law for himself by reading the statute as opposed to having to rely in some areas entirely on his lawyer's advice as to what the case law was. You will probably find a number of areas of this sort where you are seeing an attempt to bring something out of the case law and put it in the statute. I think you will probably have concerns about the fact that it isn't as precise as you might like and I think in a way that's a reflection of the imposition or the flexibility if you want to put it in other terms of the case law. It's an attempt to codify.

Mr. Chairman: Thank you. Are there any other comments with regard to section 21?

Section 21 agreed to.

Mr. Chairman: Sections 22 to 28 inclusive, are there any--

On section 22:

Mr. Renwick: On section 22, I think we should be aware as we are going through here that we have presentations that affect certain sections of the bill. I do not pretend that my memory is all that accurate, but I think that the board of trade was concerned about the elimination of shares with par value and commented about that.

Mr. Chairman: I might also note in the comments that were prepared by the clerk's office that in exhibit 2--I think that was the church--they were also concerned in section 20 about the loaning of money. Mr. Renwick you have--

Mr. Renwick: Well, we are coming to section 20 are we not?

Mr. Chairman: That is right, we are going back to that. Section 22, you are correct is abolition of par value shares. The board of trade, I believe, does not--

Mr. Renwick: I am sure that the board feels that there is substance in its concern, but I suppose we have to rely on the

ministry and also on Mr. Hebb and his colleagues to indicate to us that the concern is not of any significant consequence.

Mr. Chairman: Yes, Mr. Howard.

Mr. Howard: Part III, Mr. Renwick, dealing with corporate finance is completely new to the province of Ontario and has been exhaustively reviewed and re-reviewed in the light of comments from the board of trade and others. The final product, though it is not exactly the same as the Canada, largely follows the Canada bill. But the principal point is the elimination of the par value shares which we feel with the amendments that have been made to the Canada version do not, in any way, prejudice those who are familiar with the games that were played with par value shares in planning. Am I right Mr. Hebb, or have I gone off the track there?

Mr. Hebb: Let me say two things about it. First of all--

Mr. Renwick: If you and your colleagues would like to move up to the table and be with us, that would be much more convenient.

Mr. Chairman: There are four of you there and there are four microphones along the line. You may have interest in one in particular but, yes, you are going to wear out your chair getting up and down there. Carry on Mr. Hebb.

11:10 a.m.

Mr. Hebb: It is fair to say that there would be many among the legal profession who would be opposed to the abolition of the par value concept and that is reflected in the board of trade legal committee submission. On the other hand, it is our view that following the lead of the Canada Business Corporations Act in this regard and adopting the so-called stated capital concept is workable. Canada Business Corporations Act provisions have been in effect now since 1975.

I should say there are two concepts, essentially. First, the shares have to be issued for their true value and second, you have to put the total consideration that you get for the shares into a capital account. Since the issue price of the shares must reflect the full value of the consideration, it is no longer possible, as it was before, to allocate part of the consideration to the capital account and another part of the consideration to an attributed surplus account.

There are a whole lot of exceptions that are provided for tax reasons in connection with certain non-arm's-length transactions. It is our view that these exceptions which have been taken from the Canada Business Corporations Act in fact provide the flexibility that is required.

Mr. Renwick: Are you satisfied that nobody is adversely affected by this change?

Mr. Hebb: Yes, I am, although there was certainly a division in our committee on this matter. Let me put it this way:

There was a division in our committee on whether par-value shares should be abolished. There was not consensus on the evil that was perceived by the Dickerson report in 1975 or earlier that led to the abolition of par-value shares in the Canada Business Corporations Act. On the other hand, there was consensus in our group that the new approach provide the same flexibility as was available under the par-value share regime.

Mr. Westlake: I introduced myself yesterday, Mr. Chairman. Westlake is my name.

It is perhaps the single most common way in which existing charter documents will, however, be off side with the new act. Most companies that now exist in Ontario will have par-value shares as part of their charter documents. When we come to consider the transitional rules, the present proposal is that this statute will be deemed to amend your existing charter documents to the extent necessary to bring them into conformity with the act. That will be the one change that will universally affect almost all companies now existing.

It is, however, a result that does not wreak any injustice on those companies. Par value, according to the Dickerson report, I think in actuality is a confusing concept to a member of the public. If a share has a stated value of \$10 as its par value, there tends to be an emotional attachment to the idea that that share is in some way worth \$10, when its value may, through subsequent events, be nothing. It think it is capable of being misunderstood, although not perhaps to the degree the Dickerson report has declared. Other than in very technical areas, I think the abolition of par-value shares will not wreak any havoc in the Ontario system.

Mr. Elston: I am interested in the reaction of chartered accountants to the change. It may mean--I do not know if it will mean--a lot of work on that end of it. We tend to think about what is going to happen with corporations actually making the changeovers and the technical documents. What would this mean for the chartered accountant's situation, and the changes a corporation will have to go through bookwise, I guess.

Mr. Knight: I am not aware it should cause any particular problems. I am not aware that any undue problems have been encountered under the Canada Business Corporations Act, for example. I am not concerned.

Mr. Elston: There is really not going to be any catchup. That was one of the concerns we had, when these amendments were made through the act itself in section 274. We are trying to make it easy so that there is not a lot of things that will pile up.

Mr. Chairman: Any other comments with regard to section 22? Shall section 22 carry?

Section 22 agreed to.

Mr. Chairman: Sections 23 to 28, inclusive. Are there any amendments or comments?

On section 23:

Mr. Renwick: Mr. Hebb, I think you or Mr. Levitt commented on the issuance of shares for other than cash. Is that correct?

Mr. Hebb: Yes. I don't believe there is a new principle here, other than the one that I just cited in reference to the stated capital regime, where you issue shares for other than cash, that is for property. You have to establish that you got for the shares the same consideration you would have received had you issued those shares for cash. In order to do that, you don't necessarily have to determine the full value of the property but you have to determine the property is worth at least what you would have got for the shares had you issued them for cash. Do you follow me?

Mr. Renwick: Yes.

Mr. Hebb: Section 23(4) in combination with some of the subsections at 24 is an attempt to spell that out somewhat more clearly than we believe was spelled out previously in the Ontario Business Corporations Act and, in fact, the Canada Business Corporations Act.

We hope that practitioners will be able to work through section 23(4) in conjunction with section 24(2), 24(3) and 24(4) on a step basis in connection with a transaction where you issue shares for property.

Mr. Renwick: I believe I understand section 23(6). Would you just tell me what it means?

Mr. Hebb: Section 23(6)--

Mr. Renwick: It sounds like a consequential requirement.

Mr. Hebb: Section 23(6) is not a new concept. It was new in this act, I believe, in 1970. It was brought in conjunction with the change in the law that provided that you could no longer issue shares subject to call. In other words, shares had to be issued as fully paid. At that time in 1970, there was a collateral provision introduced saying that issuing shares and getting a promissory note to pay the issue price at some future date did not represent payment in full. It was just to make that provision clear.

Mr. Renwick: Right. Thank you.

Mr. Westlake: Subsection 6 specifically is saying that you can't take a promissory note as full payment for the shares. A promissory note in law would be classed as property but that is disqualified property for these purposes of the person to whom the shares are being issued.

Mr. Chairman: Shall section 23 carry?

Section 23 agreed to.

Mr. Chairman: Shall sections 24 to 28 inclusive carry? We are going past what I believe is the right of first refusal in section 26.

Mr. Renwick: I am happy up until section 28.

Sections 24 to 27, inclusive, agreed to.

On section 28:

Mr. Renwick: The only reason is that the board made pretty strong pitch on the question of subsidiaries being able to hold par shares of parent companies. I don't pretend to be an expert in the examples which they gave to us, but I would appreciate some comment because I have difficulty understanding the reason for it logically, plus the fact that I sense that there is some real merit in the position taken by the board of trade.

Mr. Hebb: I have a couple of comments. One, I suppose a sort of superficial one, is on the main purpose that they alleged for this change, and that was a way to give shareholders a choice between dividend and capital gain treatment.

My advice, from a tax specialist in my firm, is that under the recent budget, budget resolution 54, that at least in connection with public corporations, that a shareholder dealing with an arm's length public corporation no longer has a choice that he has capital gains treatment. I believe that takes away from this point at least so far as public corporations are concerned.

I guess my other reaction is I just have never been persuaded and I have seen this comment in earlier briefs from the board of trade, that this change is one that is really needed in terms of providing flexibility.

I could ask my colleague Maurice Coombs to speak a bit about the philosophy behind this section.

11:20 a.m.

Mr. Coombs: Just conceptually, the idea of a subsidiary corporation holding shares with the parent, is in many instances, tantamount to the parent holding its own shares and in effect being able to trade in its own shares. The common law has for a long time found on that kind of trafficking by a corporation in its own shares, and there are provisions specifically in this act which govern the circumstances in which a corporation can hold its own shares and describing what it has to do if it does.

To allow a subsidiary to hold its parent's shares would in effect allow you to get around the rules governing how the parent itself could hold its own shares. Except perhaps for some esoteric tax reasons and for the odd corporate reorganization, in my view there is no particular need for a subsidiary to be able to hold shares in its parent. On a practical level, the possibility for abuse that might arise from permitting it outweighs any argument which you might make in that direction.

Mr. Elston: Section 28 deals with holding shares and we are allowing the corporation in the new amendments to set up the special restrictive shares to hold their own shares for a period of up to two years. Should there be any exception provided in this section to allow them to hold those for a two year period in the meantime to allow them to proceed with that? We have two sections which provide them with exceptions where they can hold their own shares. Should there be a third exception so they can get into sections 42 and 44?

Mr. Coombs: The feeling is that is not a necessary extension. In fact, the provisions for allowing a corporation to hold its own shares for up to two years for national energy program purposes is the grant of an exceptional right to NEP type corporations. I would feel uncomfortable about extending it further than necessary. For NEP purposes, allowing the corporation itself to do it is I think good enough; to go further is to give flexibility that is not really needed.

Mr. Elston: What I was really saying is we would then put in the exceptions in that particular section and they would only deal with the NEP provisions. There would not be an extension beyond that I would presume. I mean it would be under those circumstances. I do not know why else anyone would want to take advantage of it.

Mr. Coombs: I think the philosophy I am trying to put forward is that you want to give something to corporations to assist them for NEP, but you want to give them as little as you can because what you are giving them is pretty exceptional. You want to keep it narrow and restricted unless somebody can demonstrate a need for it.

Mr. Elston: All I guess I was saying was that we open the door here to allow the inclusion of those sections 42 and 44. That is the only thing.

Mr. Coombs: I get your point, yes.

Mr. Spensieri: As a matter of statutory interpretation, can a specific section override that general prohibition? I do not think it can really.

Mr. Westlake: You may need a broadening of the lead in language such as, "except as is provided in section such and such."

Mr. Elston: That is all I was commenting on.

Mr. Hebb: Excuse me, if I am following that point, I think the exception is already there. The first line of 28(1) says, "except as provided in section 29."

Mr. Elston: Subsection 2, I guess.

Mr. Hebb: And section 29.

Mr. Elston: Section 29. That is right.

Mr. Hebb: The NEP provision is an amendment to section 29.

Mr. Elston: That is right. Okay. I was reading that as section 29(2) and 32. I apologize for confusing it.

Mr. Chairman: Any other comment with regard to section 28? Shall section 28 carry?

Section 28 agreed to.

On section 29:

Mr. Chairman: Mr. Mitchell moves that section 29(4) of the bill be struck out and the following be substituted therefor:

"(4) A corporation may, for the purpose of assisting the corporation or any of its affiliates or associates to qualify under any prescribed act of Canada or a province or ordinance of a territory to receive licences, permits, grants, payments or other benefits by reason of attaining or maintaining a specified level of Canadian ownership or control, hold shares in itself that,

"(a) are not restricted for the purpose of assisting the corporation or any of its affiliates or associates to so qualify; or

"(b) are shares into which shares held under clause (a) were converted by the corporation that are restricted for the purpose of assisting the corporation to so qualify and that were not previously held by the corporation.

"(5) A corporation shall not transfer shares held under subsection 4 to any person unless the corporation is satisfied, on reasonable grounds, that the ownership of the shares as a result of the transfer would assist the corporation or any of its affiliates or associates to achieve the purpose set out in subsection 4.

"(6) Where shares held under subsection 4 are transferred by a corporation, subsections 23(1), (3), (4), (5), and (6), clause 126(3)(c) and subsection 129(1) apply with such modifications as the circumstances require, in respect of the transfer as if the transfer were an issue.

"(7) No transfer of shares by a corporation shall be void or voidable solely because the transfer is in contravention of subsection 5.

"(8) A corporation holding, in the capacity of a legal representative, shares in itself or in its holding body corporate or a subsidiary body corporate of a corporation holding, in the capacity of a legal representative, shares of the corporation shall not vote or permit those shares to be voted unless the corporation or subsidiary body corporate, as the case may be,

"(a) holds the shares in the capacity of a legal representative; and

"(b) has complied with section 48 of the Securities Act where that section is applicable."

Mr. Renwick: The discussion we had yesterday with Mr. Coombs satisfies me with respect to this proposed amendment.

Mr. Chairman: Are there any other comments with respect to Mr. Mitchell's amendment? Shall the amendment of section 29(4) carry?

Motion agreed to.

Mr. Chairman: Shall section 29 in its entirety, as amended, carry?

Section 29, as amended, agreed to.

On section 30:

Mr. Chairman: Any comments? I notice the board of trade in their comments refer to sections 28 and 30 on the same page.

Mr. Renwick: That is really the same point we discussed earlier, as I understand it.

Mr. Chairman: Shall section 30 carry?

Section 30 agreed to.

11:30 a.m.

Mr. Chairman: Any comments on sections 31 to 34, inclusive?

Mr. Renwick: Oh, just a facetious remark about 34. It is always interesting to see that the corporate world manages to get class actions before anybody else does. We argue and fight for years and years for class actions and then we get a bill like this with a class action embedded in it and we get a long study by the law reform commission of the problems involved in this.

Mr. Chairman: Are there any other comments with regard to section--

Mr. Renwick: One of these days we may, in fact, have a class action.

Mr. Chairman: Are there any other comments with regard to section 31 to 34, inclusive? Shall sections 31 to 34 inclusive carry?

Sections 31 to 34, inclusive, agreed to.

On section 35:

Mr. Chairman: Mr. Mitchell moves that section 35(1) of the bill be struck out and the following substituted therefor:

"(1) Upon a purchase, redemption or other acquisition by a corporation under section 30, 31, 32, 40 or 183 or clause 246(3)(f) of shares or fractions thereof issued by it, the corporation shall

deduct from the stated capital account maintained for the class or series of shares, of which the shares purchased, redeemed or otherwise acquired form a part, an amount equal to the result obtained by multiplying the stated capital of the shares of that class or series by the number of shares of that class or series or fractions thereof purchased, redeemed or otherwise acquired, divided by the number of issued shares of that class or series immediately before the purchase, redemption or other acquisition."

Mr. Mitchell further moves that section 35(7) of the bill be struck out and the following substituted therefor:

"(7) For the purposes of this section,

"(a) a corporation holding shares in itself as permitted by subsections 29(1) and (2) shall be deemed not to have purchased, redeemed or otherwise acquired the shares; and

"(b) a corporation holding shares in itself under clause 29(4)(a) shall be deemed not to have purchased, redeemed or otherwise acquired the shares at the time they were acquired, but,

"(i) any of those shares that are held by the corporation at the expiration of two years, and

"(ii) any shares into which any of those shares were converted by the corporation and held under clause 29(4)(b) that are held by the corporation at the expiration of two years after the shares from which they were converted were acquired,

"shall be deemed to have been acquired at the expiration of the two years."

Any comments with regard to Mr. Mitchell's amendment? Any other comments? If not, shall Mr. Mitchell's amendment carry?

Motion agreed to.

Mr. Chairman: Shall section 35--I draw your attention to 35(6) in the board of trade's comments. Does anybody wish to follow up with the board of trade's comments? Shall the question be put on section 35, as amended?

Mr. Hebb: Mr. Chairman, philosophically it is the same matter that we were discussing a moment ago in reference to sections 28 and 30, and I guess I would oppose it for the same reason that it is somewhat incestuous.

I guess they start with the position that under the statute when a company purchases its own shares they are either cancelled or they are restored to the status of unissued shares. In other words, the act does not recognize the concept of treasury shares, that concept, by the way, being the one we discussed in connection with NEP in this limited circumstance. They are saying the act doesn't recognize the concept of treasury shares in the US sense, that is, the shares come back to the company and are considered to be outstanding and those very same shares may subsequently be reissued.

They are saying since the shares are not outstanding in the hands of the company, the company cannot use them as collateral for financing purposes. Therefore, if a wholly owned subsidiary of the company were to be permitted to hold those shares, then that wholly owned subsidiary could use the shares, provide the shares, in support of the parent company's financing. To me, it is just another aspect of this problem that I would refer to as incest between the subsidiary and the parent. I think the philosophical reasons for opposing it are those that Mr. Coombs discussed a few minutes ago. That is a policy issue for you, but certainly the thrust of this act is against a parent company holding its own shares or, similarly, subsidiaries holding shares of parents. It has a long history in common law.

Is there anything else you could add to that, Mr. Coombs?

Mr. Coombs: No. I think that is fine.

Mr. Hebb: I guess the other thing I could say is what they are really suggesting here is something to work around a broad thrust of the act that is reflected in those other sections. If you were to reject the conceptual or philosophical position that we have been suggesting to you now, you wouldn't take this suggestion. You would draft the thing in a much more fundamental way and you would remove the restrictions about a corporation holding its own shares. You would permit a corporation to hold its own shares and permit subsidiaries to hold the shares of the parent and you would go a long distance in the other direction. This is sort of an attempt to tinker with the existing act to work against the prevailing philosophy in order to provide some relief of the prevailing philosophy.

Mr. Elston: It would be consistent if we had adopted their philosophy from earlier times, so it may be that their comments are made in that light.

Mr. Chairman: My attention has been distracted with regard to amendments coming up.

Section 35, as amended, agreed to.

Mr. Chairman: At this point, Mr. Renwick, may I deal with the one amendment of yours that doesn't refer to a particular section? Might I ask where you would like that?

Mr. Renwick: I thought we might put that in at some point when the going was tough.

11:40 a.m

Mr. Chairman: When everybody was going to sleep, was that it? When would you propose that that be, or would you like to spring that upon us?

Mr. Renwick: I sort of shuffled it into my deck here. Perhaps when I come across that, it will coincide with the time. I wanted to make sure Mickey Hennessy was here.

Mr. Elston: The next time when we go from section 6 through 27 and ask for them to be passed, he may slip it in on us.

Mr. Chairman: You will make sure that the chair does not forget?

Mr. Renwick: I will do my very best to.

Mr. Chairman: Are we now prepared to deal with section 20? If we go back to section 20, we have Mr. Renwick's. This is not entitled on the top "Mitchell." Perhaps you people would put Mr. Mitchell's name at the top of it so we can distinguish between his amendment and Mr. Renwick's. Mr. Mitchell.

On section 20:

Mr. Mitchell: Just as a preamble, Mr. Chairman, as I mentioned earlier, part of this amendment has come about because of some concerns expressed by Mr. Renwick earlier.

Mr. Chairman: Mr. Mitchell moves that the following clause (c) be added to section 20(1): "to a subsidiary body corporate of the corporation," and that clauses (c) and (d) be renumbered as (d) and (e).

Mr. Mitchell further moves that clauses (c) and (d) of section 20(2) be deleted.

He further moves that the words "except directors and senior officers" be inserted after the word "employees" in the first line of clause (e) of subsection 2, and that clause (e) be renumbered as clause (c).

Mr. Renwick: I take it that what you have done is to eliminate the insolvency test. Is that right?

Mr. Wells: Perhaps I could explain it a bit for you. If you look at the existing provisions, 20(2)(c) and (d), if you delete clause (c) with respect to assistance to its holding body corporate, that then is covered off by the insolvency test because, in effect, 20(1)(a) covers it because it is assistance to a shareholder. Then we have moved (d), a subsidiary body corporate, up above into subsection 1, again making it subject to the solvency test./

We have not moved (a) or (b) of subsection 2 because I think they are legitimately there without the solvency test. With respect to loans to employees, we just tightened it up. We have not added the solvency test to that, but we have said that you cannot loan money to directors or senior officers for housing unless you make the solvency test in effect, but to other employees, yes.

Mr. Mitchell: My own understanding is that in the case of employees, for a great many businesses today in relocation allowances and so on this is a normal procedure in their business that they do. That is why employees have been left, but we have exempted directors and senior officers.

Mr. Renwick: I am not going to move my amendment. I want to put it this way: I would be quite happy if this section corresponded to the section in the Canada Business Corporations Act. That would solve my problems. They were simply confusing drafting problems.

If I have whatever section it is in the Canada Business Corporations Act, it seemed to me to deal in a very straightforward way with each of the problems I have. I could not understand why we had to depart from it, particularly when you use the same format in sections 30, 31 and 32. In the Canada Business Corporations Act, as I understand it, the first subsection simply is the prohibition, which is fine. Secondly, the question of the guarantee, the prohibition against guarantees, is fine. Thirdly, they put in the solvency test. I will skip subsection 4 as it is not important. Notwithstanding 1 and 2--they do not eliminate 3, the solvency test--they then give the permitted loans.

Mr. Westlake: There may be an error in discussion here. It seems to me that the Canada Business Corporations Act provision is identical to section 20 as it is proposed, unless I am misreading it. Section 42 is the relevant section of the CBCA.

Interjections.

Mr. Westlake: For the Dickerson draft. I am sorry.

Mr. Renwick: Which one have I got?

Interjection: You have the Dickerson draft.

Mr. Renwick: Well, wait till I get my copy of it.

Mr. Hebb: We have the first draft of this section, which Ottawa started from and it got changed around somewhat.

Mr. Renwick: Then I will have to move my amendment.

Mr. Hebb: In fact, as I understand it, this section in Ontario is both in substance and in format virtually identical with the present federal provision.

Mr. Renwick: I was incorrect. I now have section 42 of the Canada Business Corporations Act in front of me. It is subject to the flaws of permitting the permitted loans and guarantees under subsection 2 to be made in circumstances which would render the company unable to pay its liabilities as they become due.

The argument can be made, "Well, no company would do that." I do not think that is an appropriate argument in a business corporations act. Therefore, I read it that the exception at the opening words of section 42(1), that is, "except as permitted under subsection 2," permits a corporation to make the permitted loans for guarantees under subsection 2, even if the effect would be that they had reasonable grounds of believing that they would be insolvent.

I do not intend to persist in the argument, but that was the

problem which I saw. I thought it could be solved very easily by simply putting, as was the case in section 30, the provision with respect to the insolvency test in a separate subsection, as they have done in section 30 and as they have done again in section 31 and in other sections, and making the permitted loans subject to that particular insolvency test. It would not alter anything, but it would clarify it.

Mr. Westlake: May I add one point for the assistance of the committee? There are two branches to the solvency test as the section is now drafted. Paragraphs (c) and (d), namely, inability to meet liabilities as they become due. But the more difficult one for the practitioner and the corporate businessman is the second test, and that is the realizable value of the corporation's assets. That is a fairly subjective matter at any given point in time, unless you have an up to date valuation of the company's assets, and it is sometimes difficult to make that judgement.

That accounts, I think, for the philosophy behind the CBCA in making fairly liberal exceptions to the general solvency test, in part in recognition of the difficulty of determining at any particular point in time what the realizable value is.

11:50 a.m.

Mr. Renwick: Yes, that was the point made by the board in its submission to us as well. I recognize that problem, but speaking simply in the very technical sense, the phraseology used in subsection 21 in fact takes the permitted loans and guarantees out of the purview of the insolvency test. That, I thought, was an improper result to follow. That is why I made the mistake of assuming the piece I had, which was out of the Dickerson report, solved the problem, but I am not thrown by that because, in fact, that is the way it is dealt with in sections 30 and 31 and so on.

All I wanted in my amendment was to separate clauses (c) and (d), that is the insolvency test portions of it, into a separate subsection and to provide that the permitted loans under subsection 22 would be subject to the provisions of the solvency test. That was all I wanted to accomplish.

I recognize the points which Mr. Mitchell has made in his amendment. I don't think they touch upon the particular point. As far as I am concerned, if you wish to put Mr. Mitchell's amendment, I would then move my amendment.

Mr. Chairman: Any other comments on Mr. Mitchell's amendment to section 20?

Mr. Spensieri: Qualifying the word "employees" by adding the exception for the directors and senior officers does not really cure the situation in a closely-held corporation where the directors and the senior officers could also have family members as employees and, therefore, could easily guarantee loans for these family members and thereby defeat--later when the guarantee is called upon--creditors and other people who would be looking to the corporation for funds. It seems to me it doesn't really go a long way towards rectifying the problem.

Mr. Westlake: Mr. Spensieri, there are two prohibitions. There is giving financial assistance to a class of people in paragraph a, namely, "shareholders, directors, officers or employees." The second prohibition is in paragraph b, which is to any person in the world for the purpose of purchasing shares. I think the kind of concern you are reflecting upon would be, say, guaranteeing the loan of an employee's wife or something like that. That would not be prohibited by this section. It may be questionable, from a corporate point of view, whether it is a legitimate thing to do, but it would not be prohibited unless it was for the purpose of her buying shares in the company.

Mr. Spensieri: All I am saying is if everything were under the purview of a solvency test, such as Mr. Renwick suggests, then I think we would avoid any possibility of any--

Mr. Westlake: You have to go back then to the concept of the directors and their obligations to act in the best interest of the corporation. This whole section is a limitation on what is arguably now unfettered discretion on the part of the directors to lend but it would still, in certain circumstances, be improper. So this is a narrowing of what would otherwise be the scope of the act if this were not here. I think to suggest a further narrowing of it would probably reap some unintended results as well.

I am not sure, for example, about the motion that is on the table here by Mr. Mitchell. In effect, that would move the subsidiary body corporate up to become part of subsection 1 so that it would be prohibited for any corporation to give financial assistance directly or indirectly, and that includes a guarantee, for example, if there is any question of solvency.

That means that it would be prohibited for a corporation to give any guarantee to a bank of its own subsidiary company, wholly owned or otherwise, if there were any question of solvency, and that is a difficult test to apply at any given point in time. I think Mr. Knight, representing the accounting profession, would speak to the difficulty of ascertaining in paragraph d, as the board of trade and I have emphasized before, what the realizable value is at any particular moment. Yet it is a very common corporate financing practice to have companies guaranteeing indebtedness of subsidiaries to banks and others, and vice versa.

Mr. Chairman: You said customary or often; is it not almost always?

Mr. Westlake: I do not think that is an overstatement.

Mr. Coombs: One comment that I would like to suggest to the committee is the paragraphs (a), (b) and (e) in subsection 2 of section 20 of the bill, if you were to subject those to the solvency test, as I think Mr. Renwick's amendment would do--is that correct, sir?

Mr. Renwick: Yes.

Mr. Coombs: You would, in effect, put an insolvent corporation in the position where it could not work its way out of

its insolvency. It would have grave difficulty, for example, if it were the kind of corporation that does have to move its employees around the country and subsidize their housing, keeping those employees.

If its business were the business of lending money, the only way it is going to make further profits to work its way out of insolvency is to continue to lend money, it is going to have to suspend its business. If you cannot pay persons who make expenditures on behalf of the company in order to enhance its business position when you are insolvent, it means people are going to stop doing things for you unless they get cash on the line before they do them.

Mr. Spensieri: Or inject more (inaudible).

Mr. Coombs: You must bear in mind that you are dealing with a provision that is not just going to apply to small private companies where there is all sorts of jiggery-pokery that can be carried on. This is going to apply to larger corporations which employ members of the public who are not connected with them in other ways. You are dealing with the whole business community in this area and if you make it too difficult to operate in awkward circumstances under this act people simply are not going to use this act, they will go under some other corporation statute.

Mr. Renwick: I am certainly pleased that we are having a discussion because at least it points up the fact that it was intended that the permitted loans be exceptions to the solvency rule. If that is what the position is, then it still seems to me--and yesterday when I raised the matter I indicated that the example I used with respect to the lending of money for the purpose of buying a home was only one of the examples that was there, and that seemed to me to be anomalous, that they should be lending money for their employees to buy homes if that could be done in contravention of the solvency test.

I think it is fair to say that Mr. Wells's position on it was simply that they would not do it anyway, so it really does not matter going through all the problems excepting that particular one out of the tests, and you are telling me that (a), (b) and (e) are necessary.

Mr. Coombs: The sort of thing you would face under (e), sir, is there are a number of large corporations, as I say, that do move their employees around the country from time to time. I can think of several.

Mr. Renwick: I can understand that.

Mr. Coombs: It is simply not possible for them to send an employee to Calgary or to Toronto or to Vancouver and not help him with his housing costs. If every time they are going to make a loan of \$50,000 or something to some employee to finance that, they have to go through an assessment of the realizable value of their assets--

Mr. Renwick: All right. I hear what you are saying. What you are saying is that it is contemplated that they may make the loans or give the financial assistance by means of loans guarantees or otherwise under section 20(2), regardless of the solvency test. I think that is what you are saying.

Mr. Coombs: That is my view, sir.

Mr. Hebb: The ministry, of course, is proposing to reduce the ambit of that exception by taking away the directors and senior officers taking advantage--

Mr. Renwick: Yes, I know. Therefore, in the light of this discussion, I would be interested in hearing from Mr. Howard or Mr. Wells why they want to do that. I do not particularly mind having clause 20(2)(c) deleted. I think I understand the argument sufficiently well that I will accept it and I will not put the amendment.

12 noon

Mr. Westlake: So that it is fully understood by the committee, the consequences of deleting clause (c), which I come back to, is that you then fall into the ambit of the prohibition against any loans to shareholders for any purpose, or any financial assistance, and that includes guarantees. I am not speaking just of loans here.

Mr. Renwick: I understand.

Mr. Westlake: So that any subsidiary company, if there is any question of solvency of that particular subsidiary company, and the difficulties of solvency we have discussed, it cannot issue any guarantee to its parent company's bankers, for example.

When you have a complicated corporate group, take a notorious one, the Massey-Ferguson one being a recent example, where solvency I am sure was very much at issue, that would mean that in each of the transactions that would be contemplated in reorganization of that company, the ability of any of those subsidiaries to guarantee the parent--if there was any question as to their solvency--would be eliminated. Or the penalty later on in the act is that the directors are personally liable for loans made in contravention of this section.

It is a fairly severe stricture we are doing in tinkering with the integrity of the system, which has worked reasonably well. I have not seen the abuses of it. Perhaps I do not see it from that side. I see it more from the creative necessity side of it, where bankers and others are looking for available collateral, and if you have a significant subsidiary company one of the things they would be looking to would be the guarantee of that subsidiary company, for whatever it is worth. It may not be worth much if that company is itself insolvent, but they are certainly going to want to get a plaster on everything that they can get.

If I could just make a general comment about the question of uniformity with the Canada Business Corporations Act, when we spend

endless hours debating these sections--and we had these kinds of discussions very much in our own Canadian bar committee on these, and spent many more hours than we are spending here--in the final analysis, when we could not find a compelling reason to make a change, we opted for uniformity and fell back to the position of why differ from the CBCA, and unless people are aware of specific abuses that have resulted or indeed amendments that are proposed to the CBCA, as a result of proven difficulties with that statute, we opted for consistency. I would like the committee to consider doing so in this context.

Mr. MacQuarrie: Has any consultation taken place with the Ministry of Consumer and Corporate Affairs in Ottawa, relating to proposed amendments to the Canadian Business Corporations Act? Those acts are under constant review, and it could well be that some amendments are contemplated or in the mill, and we know that the ones dealing with the energy policy are. Are there others? How consistent is our consultation with them?

Mr. Howard: I am in continuous touch with my opposite number in Ottawa, Fred Sparling, and he has had copies of each of our revised bills, including this latest one, and the only amendments he is proposing at the moment as far as I know, according to my conversation with him, are those related to the NEP. There is no suspicion that he proposes to amend section 20.

Mr. MacQuarrie: I would hate to see us going through something in the interest of uniformity and then have them come out tomorrow with something else.

Mr. Mitchell: There is constant conversation and discussion going on, Mr. MacQuarrie.

Mr. Knight: Mr. Chairman, our committee did look at section 20 in the various versions of the bill. I think we would support Mr. Westlake's comments. I am troubled by Mr. Mitchell's amendment. Like Mr. Westlake, I think the system has worked well. I am not aware of any significant abuses of it. Our committee likes the bill as drafted.

Mr. Mitchell: I have been discussing our amendment, and if Mr. Renwick is happy with the explanations that have been given, perhaps there is no need for the amendments we are proposing.

Mr. Renwick: Perhaps we would put it a little differently. I don't think your amendment spoke to the matters that were of concern to me, but I am prepared not to place my amendment if you are prepared to withdraw yours.

Mr. Mitchell: I so move. Mr. Chairman, I withdraw our amendment.

Mr. Renwick: I have only one other comment. I guess I specifically direct it to Mr. Knight. In the brief time we have been looking at this bill it is interesting the number of comments that have been raised on that very question of clause 20(1)(d). Yet the institute yesterday made no comment about it that I recall. It

is a significantly difficult clause for anybody to quantify, I would think.

Mr. Knight: Yes, it is difficult to quantify. But I think it is a sensible test.

Mr. Renwick: You do. So from the point of view of your profession it has a meaning and it is possible to apply the test.

Mr. Knight: I think it is.

Mr. Renwick: That is interesting. The board of trade was concerned, and Mr. Westlake expressed--

Mr. Westlake: I don't have a better test. Bear in that mind that that test of realizable value pervades a number of sections of the act including the ability to pay dividends to redeem shares and other similar sections where generally speaking the solvency test is carried through.

Mr. Knight: I would like to make one other comment. I notice there is one inconsistency between 20(1)(d) and the CBC Act. I don't know if it is intentional or not. In (d) of the CBC Act, the words are "the realizable value of the corporation's assets, excluding the amount of any financial assistance in the form of a loan and in the form of assets pledged or encumbered to secure a guarantee." I think I understand those words. I am not sure I fully understand why they have been left out of Bill 6.

Mr. Hebb: I don't think they have been left out of Bill 6. There is an alternative wording. Bill 6, if I am reading this correctly, has substituted the phrase, "in the form of any secured guarantee," for the words, "in the form of assets pledged or encumbered to secure a guarantee."

Mr. Howard: Mr. Knight, I am sorry you were not aware of this. The change was introduced in 20(1)(d) at the request of the board of trade. I will read the comment I received from the board of trade which prompted the change. "The asset coverage test set out in subsection 20(1)(d) is identical to its counterpart in the Canada Business Corporations Act and, in at least one instance, is unworkable."

12:10 p.m.

"In the instance of a non-wholly-owned subsidiary guaranteeing the indebtedness of its parent and giving floating charge security therefor, the test cannot be met as, regardless of the amount of the guarantee, the floating charge security given in support thereof would, in effect, encumber all of the assets of the corporation.

"This problem has been encountered under section 42 of the Canada Business Corporations Act in bank financings of corporate groups. Perhaps one way of remedying the problem would be to revise subsection 20(1)(d) to exclude from the realizable value of a corporation's assets the amount of any secured guarantee instead of excluding assets pledged or encumbered to secure a guarantee."

So in attempting to accommodate that suggestion, we made that change. But you are the expert in this area. It probably means more to you than it does to others.

Mr. Knight: Others are more expert than me, but I understand the concern and I think your point is well taken.

Mr. Chairman: Any other comments with regard to section 20? Shall section 20 as unamended carry?

Section 20 agreed to.

Mr. Chairman: Sections 36 to 41 inclusive; are there any comments? Shall sections 36 to 41 inclusive carry?

Sections 36 to 41, inclusive, agreed to.

On section 42:

Mr. Mitchell: Before I present the motion, I would like to draw to the attention of the members of the committee to subsection 3, which is the final one. We propose, and the change is minimal in there, and perhaps members of the committee might write in the change we are proposing there so that when I read the motion, I can read the motion completely.

Three will read: "Except as prescribed, nothing in subsection 2 authorizes a corporation to limit the number of shares of the corporation that may be owned by any person"--and here is the change--"unless such ownership might adversely affect the ability of the corporation or any of its affiliates or associates to achieve the purpose set out in clauses 2(a), (b), (c) or (d)."

Mr. Chairman: Excuse me, Mr. Mitchell, you intend to put--

Mr. Mitchell: I just wish the committee members to correct it because that is the way it will be put.

Mr. Chairman: You are going to delete thereafter, after the word "person" in line four--

Mr. Mitchell: "Whose ownership of the shares does not," will be replaced by, "unless such ownership might adversely affect the ability of the corporation," and so on. I think that is correct and I think that is supported. Mr. Hebb, is that--

Mr. Hebb: That is correct.

Mr. Westlake: You are deleting the words "whose ownership of the shares does not" and putting in the words "unless such ownership might"?

Mr. Mitchell: That is right.

Mr. Chairman: Mr. Mitchell moves that section 42 of the bill be struck out and the following substituted therefor:

"42--(1) A corporation shall not impose restrictions on the issue, transfer or ownership of shares of any class or series

except such restrictions as are authorized by its articles.

"(2) A corporation that has imposed restrictions on the issue, transfer or ownership of its shares of any class or series shall not offer any of its shares to the public unless the restrictions are necessary,

"(a) by or under any act of Canada or Ontario as a condition to the obtaining, holding or renewal of authority to engage in any activity necessary to its undertaking;

"(b) for the purpose of achieving or preserving its status as a Canadian corporation for the purpose of any act of Canada or Ontario;

"(c) to limit to a specified level the ownership of its shares by any person for the purpose of assisting the corporation or any of its affiliates or associates to qualify under the Securities Act or similar legislation of a province or a territory to obtain, hold or renew registration as a dealer or to qualify for membership in a stock exchange in Ontario, recognized as such by the commission; or

"(d) to attain or to maintain a specified level of Canadian ownership or control for the purpose of assisting the corporation or any of its affiliates or associates to qualify to receive licenses, permits, grants, payments or other benefits under any prescribed act of Canada or a province or ordinance of a territory.

"(3) Except as prescribed, nothing in subsection 2 authorizes a corporation to limit the number of shares of the corporation that may be owned by any person unless such ownership might adversely affect the ability of the corporation or any of its affiliates or associates to achieve a purpose set out in clause (2)(a), (b), (c) or (d).

Mr. MacQuarrie: Mr. Chairman, I have some difficulty understanding the implications of subsection 2 where we have a corporation imposing restrictions on the issue of a class or series of shares and then it goes on to say it "shall not offer any of its shares." Now one class or series has restrictions attached to them, why should the corporation be prohibited from offering another class without restriction to the public?

Mr. Mitchell: If I might first point out that these are in line with the national energy policy. In fact, I think they are duplicates. Are they not, Mr. Howard?

Mr. Howard: Yes, except I do not know to what part of subsection 2 you are referring. For example, Mr. MacQuarrie, subsection 2(a) and (b) are just lifted from the present act.

Mr. MacQuarrie: There is a blanket prohibition against the issuance, transfer or ownership against the offer of any and all shares in the company, whether they are subject to restrictions or not.

Mr. Renwick: What you are saying is--just so I make sure

I understand it--you are saying the prohibition should be, "shall not offer any of such shares."

Mr. MacQuarrie: That would seem to be the--

Mr. Renwick: Is that the--

Mr. Coombs: If I might comment on that, Mr. MacQuarrie, the philosophy that you are referring to, and it really is a matter of philosophy or policy, is that a public offering corporation ought not to have both a series or class of shares being offered to the public in the matter and at the same time have a separate class of shares which are restricted, which are not available for ownership by the public.

My interpretation of that philosophy is a corporation, if it is a public offering corporation, should be wholly public offering. There should not be some special class of shares which might carry special or preferential out of good rights which are withheld from the public and, in fact, the directors can ensure never reach the hands of the public.

The potential, for example, for preventing takeover offers in what might otherwise be perfectly proper in appropriate circumstances which might well be beneficial to the holders of the shares. Those takeover offers would be precluded if you were able to have this special class of shares sitting in the hands of management.

12:20 p.m.

Mr. MacQuarrie: But then we have paragraph one of this section which says that really you can have restrictions on a class or series of shares. In other words, the act permits the issuance of more than one class of shares, one of which might have restrictions on it. Then we come down to the public offering section and I can see some merit in your explanation of a public offering or a company going public, but it seems to me that if they are attaching restrictions to a class of shares, I certainly think that the public should be made aware of those. These are restrictions in this case that are consistent with the national energy program but, at the same time, I do not see why a company which is otherwise complying with all of the regulations and the laws should be prohibited from offering unfettered class of shares to the public.

Mr. Coombs: All I can do is to reiterate the policy I have just tried to describe. If the corporation does not wish to go the public capital markets, it can put any restriction it wishes within whatever limits the law will impose, any restriction it wishes on the issue, transfer or ownership of its shares. Once, however, a corporation decides that it is going to the capital markets, then, as a matter of corporate principle as opposed to securities law principle, as a matter of corporate principle it is inconsistent for that corporation to say we will go to the public but we will make sure the public can never have full ownership of this company, that we will, in effect, provide a ready remedy for management to perpetuate itself forever.

The corporation has to make up its mind when it wishes access to the public money whether it wishes to put itself fully in the public hands or whether it wishes to stay private. It must do one or the other, it cannot straddle the fence.

Mr. Mitchell: As a further comment, Mr. MacQuarrie, just as a note, this was a recommendation of the bar committee and, in fact, was forwarded to the Ontario Securities Commission for approval.

Mr. Howard: Mr. Chairman, I am sorry, I confused Mr. Mitchell. He was asking about an amendment Mr. Renwick requested and we were discussing that, but he got it mixed up with the current problem. It does not relate to the current problem. My apologies.

Mr. Mitchell: No, my apologies. We were discussing some motions in advance of when we were supposed to.

Mr. Chairman: Are there any other comments with regard to Mr. Mitchell's amendment of section 42?

Mr. Mitchell: I had jumped ahead to section 45.

Mr. Chairman: Mr. Renwick, you are satisfied with Mr. Mitchell's amendment to section 42?

Mr. Renwick: Yes, I am satisfied with that and I am satisfied with Mr. Coombs' comment.

Mr. Hebb: I just might make one comment, and that is that this approach that you are questioning is embodied in the present act. This does not represent a conceptual change in this act, it is a continuation of the present condition.

Mr. Mitchell: I apologize for that confusion that I gave you, too, Bob. I was jumping ahead. I have got so many papers here in front of me, and so many helpers.

Mr. Chairman: Shall Mr. Mitchell's amendment carry?

Motion agreed to.

Section 42, as amended, agreed to.

Section 43 agreed to.

Mr. Chairman: Shall section 44 dealing with debt obligations carrying on from 43, as in the draft act carry?

Section 44 agreed to.

Mr. Chairman: Is this not an opportune time, 12:28 p.m., to break off and we will come in again with section 3(a) and Mr. Mitchell's amendment?

Mr. Mitchell: Yes, I might not mind that because this one

is a lengthy one and at this point there should be a little breather.

Mr. Chairman: Well, if everybody could get here for a quorum, we can have him start reading and then you go out and make your phone calls and get coffee and so on, while he is reading. Mr. Elston please will not request a rereading.

The committee recessed at 12:28 p.m.

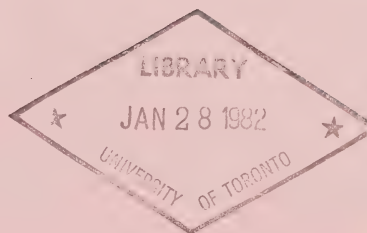
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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BUSINESS CORPORATIONS ACT

THURSDAY, JANUARY 7, 1982

Afternoon sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Treleaven, R. L. (Oxford PC)
Andrewes, P. W. (Lincoln PC)
Breithaupt, J. R. (Kitchener L)
Eaton, R. G. (Middlesex PC)
Elston, M. J. (Huron-Bruce L)
Gordon, J. K. (Sudbury PC)
Laughren, F. (Nickel Belt NDP)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Piché, R. L. (Cochrane North PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M. A. (Yorkview L)

Substitutions:

Hennessy, M. (Fort William PC) for Mr. Andrewes
Kolyn, A. (Lakeshore PC) for Mr. Piché

Clerk pro tem: Nokes, F.

From the Ministry of Consumer and Commercial Relations:
Howard, B. C., Executive Director, Companies Division
Mitchell, R. C., Parliamentary Assistant
Wells, E. J. K., Director, Company Law Branch

From the Ministry of the Attorney General:
Yurkow, R., Legislative Counsel

Witnesses:

Knight, D., Chairman, Corporation and Securities Law Committee,
Institute of Chartered Accountants of Ontario

From the Canadian Bar Association Committee on Bill 6:
Coombs, M.
Hebb, L.
Spence, J. M.
Westlake, B.

ERRATUM

The following identifications should have appeared in issue J-4:

From the Toronto Stock Exchange:
Pringle, L., Vice-President, Member Regulations
Wilton-Siegel, H., Tory Tory Deslauriers and Binnington

Sorell, R., Counsel for Midland-Doherty

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Thursday, January 7, 1982

The committee resumed at 2:12 p.m. in committee room No. 1.

BUSINESS CORPORATIONS ACT
(continued)

Resuming consideration of Bill 6, An Act to revise the Business Corporations Act.

Mr. Chairman: Section 44 has been carried.

Mr. Elston: Mr. Chairman, for the information of the members, you might have noticed our companion, Mr. Breithaupt, is not with us today. He suffered an accident last night on his way to a candidates' meeting. He has four broken ribs and is currently in Strathroy Hospital.

Mr. Chairman: I heard about that at noon. He will be back on the campaign trail Monday, and he was wearing his seatbelt. That is what I understand.

Mr. Elston: I understand that too.

Mr. Cunningham: I am filling in for him, so watch out.

Mr. Mitchell: Mr. Chairman, I would like the record to show the committee members express their concern. They are pleased nothing more serious has happened to him.

Mr. Chairman: We left off with part III-A with Mr. Mitchell moving a lengthy amendment.

Mr. Chairman: Mr. Mitchell moves that the bill be amended by adding thereto the following part:

PART III-A

Sale of Restricted Shares

"44a.-(1) A corporation that has restrictions on the issue, transfer or ownership of its shares of any class or series in order to assist the corporation or any of its affiliates or associates to qualify under any prescribed act of Canada or a province or ordinance of a territory to receive licences, permits, grants, payments or other benefits by reason of attaining or maintaining a specified level of Canadian ownership or control may, for that purpose, under such conditions and after giving such notice as may be prescribed sell, as if it were the owner thereof, any of the restricted shares that are owned, or that the directors, in good faith, have determined may be owned contrary to the restrictions.

"(2). Where shares are to be sold by a corporation under subsection 1, the directors of the corporation shall select the shares for sale in good faith and in a manner that is not unfairly prejudicial to and does not unfairly disregard the interests of the holders of the shares in the restricted class or series taken as a whole.

"(3). Where shares are sold by a corporation under subsection 1, the owner of the shares immediately prior to the sale shall by that sale be divested of his interest in the shares, and the person who, but for the sale, would be the registered holder of the shares or a person who satisfies the corporation that, but for the sale, he could properly treated as the registered holder of the shares under section 66 shall, from the time of the sale, be entitled to receive only the net proceeds of the sale, together with any income earned thereon from the beginning of the month next following the date of the receipt by the corporation of the proceeds of the sale, less any taxes thereon and any costs of administration of a trust fund constituted under subsection 5 in relation thereto.

"(4). Subsections 66(4), (5) and (6) apply in respect of the person who is entitled under subsection 3 to receive the proceeds of a sale of shares under subsection 1 as if the proceeds were a security and the person were a registered holder of the security.

"(5). The proceeds of a sale by a corporation under subsection 1 constitute a trust fund in the hands of the corporation for the benefit of the person entitled under subsection 3 to receive the proceeds of the sale, and any such trust fund may be commingled by the corporation with other trust funds and shall be invested in such manner as may be prescribed.

"(6). Reasonable costs of administration of a trust fund referred to in subsection 5 may be deducted from the trust fund and any income earned thereon.

"(7). Subject to this section, a corporation may transfer any trust fund referred to in subsection 5 and the administration thereof to a trust company in Canada registered as such under the laws of Canada or a province, and the corporation is thereupon discharged of all further liability in respect of the trust fund.

"(8). A receipt signed by a person entitled under subsection 3 to receive the proceeds of a sale that constitute a trust fund under subsection 5 shall be a complete discharge of the corporation and of any trust company to which a trust fund is transferred under subsection 7 in respect of the trust fund and income earned thereon paid to the person.

"(9). A trust fund described in subsection 5 together with any income earned thereon, less any taxes thereon and cost of administration, that has not been claimed by a person entitled under subsection 3 to receive the proceeds of a sale that constitute the trust fund for a period of 10 years after the date of the sale is forfeited to the crown."

Mr. Chairman: Any comments?

Mr. Renwick: I am satisfied with the provision following the discussion which we had with Mr. Hebb and Mr. Coombs yesterday about the implications of this section. I do not have any problems with it.

Mr. Spensieri: Perhaps this will be something that will be dealt with by the regulations, but I see our technicians are here and they are some of the best in the line. I am wondering how the actual mechanics of this deemed transfer would work. For instance, my concerns are what provisions would there be for delivering up of certificates? What kind of mechanism would be set up to effect these deemed for sales? It seems to me there is going to be some horrendous difficulties in terms of an unwilling shareholder who is going to be divested. Has any thought been given to the mechanics?

Mr. Coombs: Yes. Thought has been given to that. Some of the initial thoughts that were formed in connection with how this was to operate involved requirements for the surrender of the certificates by the shareholder to the corporation and so on. When you begin to deal, however, with foreign shareholders, many of whom are going to be the ones affected by this, a provision in the statute requiring submission of the certificate is really going to be ludicrous. It will be there and it will be the law of Ontario, but if you cannot reach the shareholder with the law of Ontario to compel him to surrender the certificates, it is not going to help you very much.

What we expect will occur under the regime prescribed by this new section 44a is that in many instances the shareholder, when told that he is going to be sold, will simply say to the company he would prefer to conduct the sale himself, so the company will not actually have to use this authority. If, however, the company does have to use this authority, then it will effect the sale by issuing a substitute certificate, and the certificate which is outstanding will be notified to the brokerage community as being a certificate bearing number such and such, representing so many shares, which now represents not an interest in the shares of the corporation, but in the trust fund under this section.

It is going to be quite onerous, we suspect, on the brokerage community, but they have not shown any disinclination to take up that burden. In fact, we have not had any representation from them complaining about this provision in the federal exposure draft.

Mr. Mitchell: If I may, and I apologize to the committee and, not being a lawyer, I hope I am not going to offend the drafters and what not, in 44a(1) we refer to an act of Canada or a province or ordinance of a territory. I just note that in subsection 7 we only comment on laws of Canada or a province. I stand to be corrected, but my assumption would be that the same repeatability should be in theirs as in subsection 1--an ordinance of a territory. I do not know; I am asking the question.

Mr. Coombs: I must admit it is done this way, I presume, because there are no trust companies in the territories, but I see your point.

Mr. Hebb: More precisely, there is no trust company laws in the territories.

Mr. Mitchell: That is why I raised the question.

Mr. Coombs: I think that is the reason.

Mr. Mitchell: All right. May I just ask a question? You say there are no trust companies in the territories. Does that mean that there never will be? Would we have to go back and change this bill for a little situation like that? Would it do any harm to have in here the repeatability as in section 1?

Mr. Coombs: Not at all.

Mr. Mitchell: Mr. Chairman, I would so move, or would request the committee's permission to amend subsection 7, that it conform with the wording as in section 1, where it would read, "ordinance of a territory." It would be in line five.

Mr. Coombs: I wonder if we need to use the word "ordinance." In subsection 1 we are talking about "act of Canada or a province or ordinance of a territory," setting off ordinance against act. Here we are only talking about laws, which is a much more general term, "the laws of Canada or a province or a territory."

Mr. Mitchell: That is fine, that is why I was seeking guidance here. I noticed what seemed to me to be something--

Mr. Hebb: Then, Mr. Chairman, the addition would be "or a territory"?

Mr. Chairman: "Or a territory," yes. It will be in line five following the word "province." You would be adding the words "or a territory."

Since undoubtedly Hansard is going to show that as two different motions, are there any further comments upon Mr. Mitchell's addition of those three words, "or a territory," in subsection 7 of 44a? If not, shall Mr. Mitchell's latter three-word amendment carry?

Motion agreed to.

Mr. Chairman: Is there any other discussion on Mr. Mitchell's main amendment, the addition of part III-A? If not, shall Mr. Mitchell's amendment carry?

Motion agreed to.

Mr. Yurkow: Mr. Chairman, if I may just point out to the committee we would have proposed to renumber the bill once it is through, so there will not be a III-A, it will become IV, and the rest will be renumbered and the internal references would be corrected.

Mr. Chairman: To be neat and tidy, would it be necessary to put a motion to that effect?

Mr. Mitchell: No, I do not think so.

Mr. Yurkow: I do not think so; it is more for the information of the committee.

On section 45:

Mr. Chairman: Mr. Renwick moves that section 45(4) do not stand as part of the bill.

I might point out that I placed this amendment of Mr. Renwick's that it do not stand, and I am following the routine throughout here that if a section is to be deleted it precedes a motion that is amending, so if the deletion succeeds, the amendment following it does not need to be voted upon. Is that satisfactory?

Mr. Mitchell: Mr. Chairman, as I mentioned before, I got kind of in advance of myself, but my understanding is that this particular section was a recommendation of the bar committee and, in fact, this is one area that has been sent to the Ontario Securities Commission. Mr. Howard, would you care to comment further?

Mr. Renwick: I would like to comment on my amendment, first of all.

The reason I raised the amendment is to raise the question. I am fully aware there are situations where the commission is a very necessary part of providing a flexible operation and to deal with the multitude of situations which can arise. On the question of indenture trustees and the question of indentures, this particular part of the bill was a matter of immense concern to me and to the committee on company law at the time it was first being considered because of the breaches which had occurred and the problems that had been raised in connection with the administration of trust indentures.

Therefore, when I noticed that the commission is now going to be entitled to exempt, I questioned what the exemptions were going to be from the protections provided under this. Mr. Westlake was good enough to speak with me earlier about my amendment, and he is not here this afternoon, but I believe he spoke with one of his colleagues about it, and it is a very limited question of exemption. This is a blanket exemption, and I cannot conceive of a situation where a corporation with share capital which is subject to the provisions of this act, or a corporation without share capital which is subject to the provisions of the laws of Ontario, that is, the Corporations Act, the ancient Corporations Act, should under any circumstances be exempt from these provisions.

I understand from the discussion I had that one of the possibilities is because the very broad term "body corporate" is used in the operative part of that section and "body corporate" in the definition we passed this morning, of course, means any body

corporate, with or without share capital and whether or not it is a corporation to which this act applies.

There may be fringe and marginal situations where it does not make sense for the trust indenture to be subject to the provisions of part IV of this act. I am quite happy to have a narrow limited exemption, but this is a broad exemption which would purport to exempt all or any, and there is no limitation on the commission at all.

I would be glad to have the matter spoken to. I am not interested in rigidity, but I am interested in only that flexibility which is necessary to make it work. This exemption is much too broad in my opinion, and I would be very opposed to seeing this wide exemption permission given to the commission--obviously assuming that they will act in good faith, obviously doing that, but the extent of their jurisdiction and their authority will be determined by the wording of this section and it is much too broad.

Mr. Howard: I was going to suggest that perhaps we could give an opportunity to the representatives of the bar here who are familiar with this to speak, and then I will comment after that.

I would ask this. This was a recommendation of the committee of the bar that was working with us and we responded to their recommendations. I passed it on to the commission and I got no negative response from the commission--the commission is a very busy organization--so I put it in, but I am quite prepared to recommend to my minister that we respond favourably to Mr. Renwick's recommendation unless the bar feels very strongly that it should remain.

Mr. Hebb: Let me begin by just confirming that the purpose of this exemption was, as Mr. Renwick has indicated, to cover marginal situations where there was very limited involvement with the province, situations where we thought it would be appropriate to be exempted from the provisions of the section. I guess it was the view of our committee that the Ontario Securities Commission was very unlikely to grant such exemptions except in the most deserving cases; but I concede to Mr. Renwick that the way it is drafted, there are no guidelines to be followed by the Ontario Securities Commission and it would be possible to exempt a trust indenture that does not fall within those marginal circumstances.

My off-the-cuff suggestion would be, because I do feel strongly that it would be a very valuable provision to have in our new act, and I know that was the feeling of the other members of our committee--my off-the-cuff suggestion would be that we would add to the provision the phrase "subject to the regulations," so the exemption would be based on some limitations that could be developed in due course and put into the regulations and then the commission could within those regulations provide an exemption, subject again, if they wished, to their own terms and conditions.

2:30 p.m.

This is very quick, off-the-cuff thinking, but I do recall that there was a very strong feeling in our committee that the

present trust indenture provisions were just too rigorous and the occasional circumstance came up where it just made no sense to subject the outside company to the Ontario trust indenture provisions, and we really needed to have or really thought we should have some basis for getting an exemption.

Mr. Howard: Mr. Wells has made the suggestion by way of amendment to subsection 4, which would restrict its application to the purely foreign or non-Ontario-incorporated trust company. Would that be helpful, Mr. Renwick?

Mr. Renwick: I am in the hands of Mr. Hebb. If that is what you are talking about; if you are talking about bodies corporate that are not incorporated under the laws of Ontario or Canada, then why could we not say that, or would that in itself be restrictive?

Mr. Hebb: There is another situation that goes beyond that and maybe I could just take this opportunity to introduce Jim Spence--he is with Tory, Tory, DesLauriers and Binnington--another member of our committee. Jim, why don't you mention this other situation?

Mr. Spence: It occurs to me that there is another situation, as well, where some exempting provision could have a proper application. It would be this: you might have an Ontario corporate issuer engaging in an issue to persons who at the time of issue are largely out of the province; some part of the issue, but perhaps only a minor part, might be finding its way into the province. In that circumstance, it might well be that a proper request could be made, or at least could properly be entertained by the commission, to consider exempting that trust indenture from the full scope of these provisions.

Mr. Renwick: I could not accept that exception because I think regardless of where the company may operate or how it may operate, if in fact it is an Ontario corporation, it should be obliged, because of the reasons lying behind the introduction of this part into the statute in the first place, we must assume the responsibility for ensuring that the holders of debt of Ontario companies have the protections inherent in this whole part.

I would be quite happy to accept an amendment that would limit it to bodies corporate which are not incorporated under the laws of Canada or any province or territory, then in those situations the commission could look at it. I would be satisfied to do it that way. If it should require a regulation to determine those that will be exempt so that at least it is public knowledge, that is another possibility. I do not think there is any magic in it, but I think it is much too broad and should not be allowed.

Mr. Mitchell: May I raise a question? I guess it is both to Mr. Renwick and to Mr. Hebb; first to Mr. Hebb. Speaking of regulations, how would you see the wording? Would it be "subject to such regulations and terms and conditions"?

Mr. Hebb: My quick suggestion was yes, subject to the regulations and subject to such terms and conditions as the

commission may impose. In other words, the regulations would first of all limit the circumstances in which the commission could grant exemptions and the commission, in turn, having decided to grant an exemption, could make a particular exemption subject to certain limitations.

Mr. Mitchell: Then to you, Mr. Renwick, by modifying it to that extent, would that satisfy your concern and narrow it as you would hope it to be narrowed?

Mr. Renwick: I think I am open. I think the point has been made and accepted, and I think I would leave it. If we want to stand this particular subsection down, I could be quite happy to leave it to the ministry to come up with a limitation on that exemption which would be acceptable. I think the point has been made and the merit of it recognized. I have confidence in the ministry to look at it.

Mr. Chairman: That is section 45(4). Are there any comments with regard to section 45(1) to (3), inclusive? If not shall the section 45(1) to (3), inclusive, carry?

Section 45(1) to (3), inclusive, agreed to.

Mr. Chairman: We will come back to subsection 4 for amendment. Are there any comments to sections 46 to 51, inclusive?

Mr. Knight: Mr. Chairman, we had some discussions down here concerning section 48. I had the impression that Mr. Howard was prepared to have further discussions with us about that later on this afternoon. I wonder if that might be set over for consideration?

Mr. Howard: What subsection were you speaking about?

Mr. Knight: Section 48(2).

Mr. Chairman: Fine, you would not want to go along with subsections 3, 4, 5 and 6, would you? It can stand by itself and the amendment will not affect anything around it, is that correct?

Mr. Howard: Mr. Knight, if subsection 2 is stood down to give you an opportunity with Mr. Hebb to work out a satisfactory little amendment--

Mr. Knight: Yes, I understand that.

Mr. Howard: To do with your point. Is that agreeable with you, Mr. Hebb?

Mr. Hebb: Yes.

Mr. Chairman: Are there any more comments with respect to sections 46 and 47?

Sections 46 and 47 agreed to.

On section 48:

Mr. Chairman: Are there any comments on section 48(1), (3), (4), (5) and (6), standing down subsection 2?

Section 48(1), (3), (4), (5), and (6) agreed to.

Sections 49 to 51, inclusive, agreed to.

On section 52:

Mr. Chairman: May we deal firstly with section 52(1) and (2), which is the lengthy part of it? Does that interfere with you, Mr. Renwick? You wish to speak to subsection 3?

Mr. Renwick: No, that does not bother me.

Mr. Chairman: Fine, are there any comments with regard to section 52(1) and (2) which are basically definition sections?

Section 52(1) and (2) agreed to.

Mr. Chairman: Mr. Renwick moves that section 52(3) be amended to read as follows:

"Except where a restriction on transfer, a lien, a unanimous shareholder agreement or an endorsement under subsection 183(11) is noted on the security in accordance with subsection 55(3), a security is a negotiable instrument."

2:40 p.m.

Mr. Renwick: Mr. Chairman, I raise it simply so that I understand what is happening here. This subclause as it appears in the draft bill purports to make a security a negotiable instrument. The only limitation on it is it states, "where a transfer is restricted and noted on it conspicuously as set out in subsection 55(3)."

I had thought that if any of those four items were noted conspicuously on the share certificate, that should by its very nature militate against it being considered a negotiable instrument under subsection 52(3). It was for that reason that I proposed the amendment--because I would like to have a discussion on that point.

It now raises the further question, which I guess could be addressed at the same time, as to whether subsection 55(3) should not read in item (a), "a restriction on its issue, transfer or sale," because of the amendments we passed earlier related to the national energy policy question. I am hoping that by moving this amendment at the early point, we can also clear up the point in 55(3).

If I may, let me ask that we first deal with 55(3)(a) which now reads, "a restriction on its transfer." Should not that now read, "a restriction on its issue, transfer or sale"? That is my first question. It seems to me logically that must be so, but I stand to be corrected on that.

Mr. Mitchell: Are you referring now to 55(3), Mr. Renwick?

Mr. Renwick: Section 55(3)(a). We have passed amendments dealing with this question.

Mr. Coombs: There is in this NEP package a proposed amendment to 55(3)(a) which states a restriction on its transfer other than a restriction referred to in subsection 8. There is a new subsection 8 which deals with NEP restrictions.

Mr. Renwick: Fine, then let me skip that. Let me go back to the point of my amendment then, which is strictly that if we are purporting in this act to make something a negotiable instrument, which poses a problem in itself, surely if it has any of the four items noted conspicuously on the certificate, that should be included in the exception. Am I just being logical or am I being correct, I am not sure?

Mr. Howard: Mr. Chairman, I would prefer that Mr. Coombs respond to this because it would seem to relate to the NEP package. At first blush, what Mr. Renwick is suggesting seems quite reasonable to me, but I don't want to create problems in connection with this other package.

Mr. Coombs: Maybe I am misconstruing something here, but I think the point you are making really has nothing to do with the NEP.

Mr. Renwick: No, the point has nothing to do with the NEP.

Mr. Chairman: I think that is correct.

Mr. Renwick: My point has to do with the share certificate which, if it has noted conspicuously on it a reference to a unanimous shareholder agreement, surely that should be itself prevent it from being considered a negotiable instrument, as would a lien in favour of the corporation or an endorsement. In other words, any other endorsement, it seems to me, destroys the purport of section 52(3) of making it a negotiable instrument.

Mr. Coombs: My feeling on your recommendation is that you may well have found a valid point here. I am a little unsure of myself commenting on it off the cuff. I would like some time to think about it, frankly.

Mr. Chairman: I would like to move Mr. Renwick back to his point, take a step right back to where he was before Mr. Coombs referred to the NEP. I would like to move Mr. Renwick right back to his comment where he was with section 55(3)(a), restricting sale and so on.

Mr. Renwick: I am not now concerned with section 55(3)(a) because I had not noticed that the very next amendment that Mr. Mitchell would be moving deals with that particular problem.

Mr. Chairman: But does it?

Mr. Renwick: We have not come to it, but we can deal with it at that point. What I now want to do is to revert to my actual motion which indicates to me that we have to include some further words in section 52(3). If Mr. Coombs and Mr. Howard and Mr. Wells would like a little time to think about it, why do we not just simply stand it down and think about it? With great temerity, I think I am probably correct, but that does not often happen.

Mr. Howard: Mr. Chairman, what Mr. Renwick is proposing is to add further exceptions to this situation and I see nothing unreasonable in that.

Mr. Coombs: The reason for my hesitation in responding, Mr. Renwick, is that I am not entirely sure that where the restriction on the transferability of the share emanates from something like a lien or an agreement, that it truly makes the certificate non-negotiable. It is really a very theoretical issue and that is what I am having trouble with.

Mr. Spensieri: If I could just speak very briefly, Mr. Chairman, to Mr. Renwick's amendment, I would like to support it but I would like to make sure I understand it.

It seems to me that the only key feature of a negotiable instrument or its only distinguishing feature is its transferability, whereas the other instances contemplated in subsection 3 are not really going to the root of the essence of a negotiable instrument but are only of a qualitative nature. It would make the security less desirable or less acceptable if it has a lien or if it is subject to a shareholders' agreement, but it would not go to its fundamental nature such as restriction on transfer would. So if we sort of take the term "negotiable instrument" and "transferability" as being synonymous, we would then see why the draftsmen would have simply chosen to use the word "restriction on transfer" in 52(3).

I just throw that out as a possibility and I would like some guidance on that.

Mr. Coombs: It is exactly that kind of thought that we want to process a little.

Mr. Howard: There may be other exceptions, too.

Mr. Renwick: As you say, it may be true. Perhaps if we just stood it down and thought about it a little bit over the recess.

Mr. Chairman: I can stand it down, but I do want to guard against standing down too many sections. Can we stand that down? You are expecting to stand it down until we have completed the amendment to section 55, is that correct?

Mr. Renwick: Why do we not do that and we can come back to it then?

Mr. Chairman: That is section 52(3) stood down. Does anyone have any comments on sections 53 and 54?

Sections 53 and 54 agreed to.

On section 55:

Mr. Chairman: Any comments with regard to section 55(1), contents of share certificate? Shall section 55(1) carry?

Section 55(1) agreed to.

On section 55(2):

2:50 p.m.

Mr. Chairman: Mr. Mitchell moves that section 55(2)(b) of the bill be amended by striking out "fee" in the fourth line and inserting in lieu thereof "charge," and that 55(3)(a) be struck out and the following substituted therefor: "(a) a restriction on its transfer other than a restriction referred to in subsection 8."

Mr. Mitchell further moves that section 55 be amended by adding thereto the following subsections:

"8. Where the articles of a corporation restrict the issue, transfer or ownership of shares of any class or series for the purpose of assisting the corporation or any of its affiliates or associates to qualify under any prescribed act of Canada or a province or ordinance of a territory to receive licences, permits, grants, payments or other benefits by reason of attaining or maintaining a specified level of Canadian ownership or control, the restriction or a reference to it shall be noted conspicuously on every share certificate of the corporation evidencing a share that is subject to restriction where the certificate is issued after the day on which the share becomes subject to the restriction under this act and any reference to the restriction shall include a statement that the corporation will furnish to a shareholder, on demand and without charge, a full copy of the text of the restriction.

"9. Where a share certificate of a corporation contains a reference to a restriction under subsection 8, the corporation shall furnish to a shareholder, on demand and without charge, a full copy of the text of the restriction.

"10. The omission to note a restriction or a reference to it under subsection 8 shall not invalidate any share or share certificate and shall not render the restriction ineffective against an owner, holder or transferee of the share or share certificate."

Mr Renwick: I am satisfied, Mr. Chairman.

Mr. MacQuarrie: I don't know if the draft amendments that you have distributed are the most up to date version, but subsection 10 in the ones distributed referred to plurals. Mr. Mitchell, when he read it, was speaking in the singular.

Mr. Mitchell: It has been reduced to singular, yes. You obviously don't have the latest listing I would guess.

Motion agreed to.

Section 55, as amended, agreed to.

Mr. Renwick: Mr. Chairman, if I could revert to section 52(3), I think I am satisfied that the point Mr. Spensieri makes answers my concern and the transfer is not restricted by a lien or unanimous shareholders agreement or an endorsement under subsection 183(11) and therefore I would withdraw the amendment.

I do ask however, whether or not now section 52(3) should not have the reference to the new section 55(8) that we have just passed, so that section 52(3) would read: "Except where its transfer is restricted and noted on the security in accordance with subsection 55(3) or 55(8), a security is a negotiable instrument."

Mr. Coombs: The restriction we are talking about under section 55(8) is not the same kind of restriction that section 52 is referring to. A share restricted for NEP purposes remains a negotiable instrument within the confines of its restriction.

Mr. Renwick: All right. Thank you. I accept that. I have no problem and, Mr. Chairman, Mr. Wells showed me your desire not to pile up.

Mr. Chairman: May I carry that one first, Mr. Renwick? Any other comments on section 52(3)?

Section 52 agreed to.

Mr. Renwick: Mr. Wells had an amendment, which is acceptable to me, on section 45(4).

Clerk of the Committee: It is just being typed up.

Mr. Chairman: We would hate to get through the act with one subsection having been stood down. It would not look good in the legislation.

Mr. Renwick: We have come to an interesting one now, perhaps I could move it.

Mr. Chairman: Just in case partisan feelings should happen to surface, maybe it would be wise to leap to the very last section in the bill.

Mr. Renwick: I think this is a good point for them to surface.

Mr. Chairman: Mr. Renwick moves that Bill 6 be amended by adding thereto the following section, "A body corporate shall not make any contribution directly or indirectly to any political party or to any candidate for elected political office anywhere in Canada."

Mr. Mitchell: I think you have something in your cheek, Jim.

Mr. Renwick: I certainly do not. I want you to know I have been completely ecumenical. I have it apply to my party as well as to the Conservatives.

Anyway, I move it. I would certainly be glad to have the discussion on it. The theory behind it is that unless we prohibit bodies corporate from voting, which may be another way of dealing with the matter--because there is nothing in here since it is the natural person of course, there is nothing really to prohibit the corporation voting in an election. That is one route we could take. Maybe the Conservative Party would favour that.

Mr. Chairman: It would only be slightly more expensive than counting gravestones, incorporating corporations.

Mr. Renwick: Create voters. There were two other methods which I considered and discarded. One was that the corporation should be required to give notice to its shareholders of the contributions which it has made, which would be fairly innocuous but at least would be one step forward. But I felt that would perhaps not solve the problem. Then I thought perhaps we should provide that contributions should be subject to confirmation by the shareholders. But I felt that was too lenient to have any appeal to the defenders of the Conservative Party, so I went the full route and simply wanted to be fair about it.

Mr. Mitchell: Mr. Renwick, I just have a feeling it may be somewhat unconstitutional, but not being a constitutional expert--

Mr. Renwick: It sounds constitutional to me. Does anybody wish to speak against it?

3 p.m.

Mr. Chairman: Perhaps Mr. Wells has some comment without speaking for or against it.

Mr. Wells: I am not speaking for or against it, obviously, as a public servant, but I do not think this body has the power to legislate what bodies corporate can do, which may be incorporated otherwise by or under the authority of the Legislature. If you are going to make this motion, sir, I suggest you say corporation.

Mr. Renwick: You think I should limit it to a corporation, do you?

Mr. Wells: I also question the modifier of "anywhere in Canada" as to what that modifier does. I have no other comment for or against.

Mr. Renwick: Well, I would limit it to Ontario then.

Mr. Hebb: I would be unhappy to see it go in the middle of the investment securities part. I am just afraid it would be overlooked and after all (inaudible) statute.

Mr. Renwick: Well, some people consider it an investment.

Mr. Chairman: Mr. Spensieri has some comment.

Mr. Spensieri: My colleagues and I would support Mr. Renwick's amendment if he would change it to only "a number-name corporation shall not make any contribution." I believe that we should be aware who our donors are without having to do a corporate search.

Mr. Renwick: Why do we not just vote on the principle of it and if it required some reshaping by legislative counsel that would be fine, as long as the principle were accepted?

Mr. Chairman: We have had jocular dealing with the matter. It is on the table. Are you proposing to change the words "body corporate" to "corporation," Mr. Renwick?

Mr. Renwick: Yes, I will change it to a corporation. I will change "Canada" to "Ontario." That would make it more palatable. So the amendment would read, "A corporation shall not make any contribution directly or indirectly to any political party or to any candidate for elected political office anywhere in Ontario."

Mr. Chairman: You are proposing that it will go in in what place? Following what section? We must find a home for it.

Mr. Renwick: I could leave the selection almost anyplace. I would probably think part XVII, which would be the general heading, would be a good place for it. Or remedies, offences and penalties. But I think we might deal with it now and leave the location of it for subsequent determination.

Mr. Chairman: The chair has a slight problem. What is Mr. Mitchell's capacity here?

Mr. Eaton: We decided that earlier, did we not?

Mr. Chairman: Fine, thank you, and he is occupying both positions.

Mr. Renwick: That depends on the Liberals, whether it is important or not. If they are supporting my amendment we would not want Mr. Mitchell to vote. We would like you to have to cast the deciding vote.

Mr. Chairman: The chair will rule that it was decided at the beginning he was a member of the committee and he would occupy the chair as a secondary role.

All those in favour of Mr. Renwick's amendment, please raise their hands. All those opposed, please raise your hands. The motion is defeated.

Mr. Renwick: We will have to try in committee of the whole House.

Sections 56 to 58, inclusive, agreed to.

On section 59:

Mr. Chairman: Mr. Mitchell moves that section 59(1) of the bill be amended by striking out "registration or transfer" in the second line and inserting in lieu thereof, "the registration of a transfer."

Mr. Mitchell further moves that section 59(2) be amended by striking out "registration or transfer" in the second line and inserting in lieu thereof, "the registration of a transfer."

Motion agreed to.

Section 59, as amended, agreed to.

Mr. Chairman: Does anyone have any comments with regard to any sections from section 60 to section 97 inclusive? Perhaps I should say to section 90, which is the end of part V.

There is nothing in the three exhibits we have and the three organizations that appeared before us, the Board of Trade of Metropolitan Toronto, Ariadne, or the Taskforce on the Churches and Corporate Responsibility--oh, that has not been returned yet.

Sections 60 to 90, inclusive, agreed to.

Mr. Chairman: We still have two sections, I believe, stood down. Section 25(4) and 48(2) are both stood down.

If it is the wish of the committee we can carry on into section 91, part VI, shareholders.

Sections 91 to 97, inclusive, agreed to.

On section 98:

Mr. Chairman: The Taskforce on the Churches and Corporate Responsibility simply expressed support for sections 98(1), (2) and (3). Are there any comments with regard to these?

I believe on Tuesday Mr. MacQuarrie questioned the "and" at the end of section 98(1)(a). Could that be given an explanation, perhaps by Mr. Howard?

Mr. Howard: Yes. Section 98(1)(a) and (b) are not intended to be either-or. It is simply a listing of the privileges or rights of a shareholder.

A shareholder may "submit to the corporation notice of a proposal; and" a shareholder may "discuss at the meeting any matter in respect of which he would have been entitled to submit a proposal." We recommend that subsection 1 not be changed.

Mr. Chairman: It should remain as is?

Mr. Howard: Yes.

Mr. Chairman: Thank you. Are there any other comments

with regard to sections 98(1), (2) and (3)? Shall section 98(1), (2) and (3) carry? Carried.

Mr. Renwick moves that section 98(4) do not stand as part of the bill.

Mr. Spensieri also has an amendment which includes a change to 98(4) instead of a deletion. Would you expand upon your motion, Mr. Renwick?

3:10 p.m.

Mr. Renwick: Mr. Chairman, I was struck in the discussion we had yesterday about this specific question when the Taskforce on the Churches and Corporate Responsibility were before us. I was particularly struck--and I am not calling him in aid of my argument--with Mr. Hebb pointing out very clearly to us that the rights of the shareholders to elect the directors is the fundamental connection between the shareholders and the management or supervision of the business and affairs of the corporation.

First, next to the voting right, in other aspects, it is the fundamental concept of the relationship between the shareholders, the directors and the corporation of which the shareholders are members.

The second point is quite clear that this does not affect--this point was also made in the course of the discussions--in any way the right of the shareholder nominating from the floor, so that what we are simply talking about is a limitation on the ability to include it in a proposal.

The concern that somehow or other this could be used in a frivolous way is much overrated because in the information circular which management would be required to circulate in any event with respect to the election of directors, they have to comply with the provisions of the regulations related to management circulars--I forget the number, but it is 18 or 19 of the regulations under the present act.

That has to set out some particulars about the proposed director, his experience, his background and that type of information. I hold no brief for whether or not that is a sufficient elaboration in the management circular, but the conception is there. You notify the shareholder what the background of the experience would be.

There were some valuable suggestions in the proposal by the task force before us yesterday, perhaps other items of information that should be included in the management circular dealing with anybody who is proposed to be elected as a director, and that would be fully protective of everyone's interest in it.

It is one of the situations where, when you move from the five per cent requirement down, somebody says, "Oh, well, we cannot quite move the whole way because there is still some area of alarm or concern." I cannot conceive that this would be abused. It would

reflect upon any company to indicate that its shareholders are going to abuse it.

I do not believe for one moment that it is beyond the wit of this assembly if an abuse develops in any area to move reasonably responsibly and quickly to eliminate the abuse. The point in value of the proposals would lead me to believe that we would be wise to go the further step and complete the mile that has been taken. I commend the ministry on going to 98(1) in its full ambit. I would just like the one limitation on it removed. I would urge my colleagues to support that amendment.

Mr. Eaton: What would be the requirement then to be nominated, just simply a person held one share and one person with one share could nominate them? Would that be the--

Mr. Renwick: That is the situation whether we pass this or do not pass it because, quite clearly, a shareholder can stand on the floor of a meeting, as I understand it, and nominate anybody at the meeting. So we are not affecting that. All we are affecting--

Mr. Eaton: But to be included in the submission ahead of time he has to have at least five per cent of the shareholdings.

Mr. Renwick: In the proposal, in the advance notice that he could give as to the reason why he wants to have a particular person or particular persons on the board of directors. I believe I am accurate in expressing that. That is my understanding of it.

Mr. Eaton: I think to our own situation of provincial elections where you have to have so many constituents at least sign your nomination papers before you can submit it. Some people are suggesting that should be even higher there because of some of the types of people who have been running, particularly in Toronto mayoralty races and things like that. Some of the politicians are leaning that way to try to encourage a little more sensibility, perhaps, to some of the candidates.

Maybe the same thing should apply here; if you are going to put the company to the expense of putting out circulars in the mail, you will not necessarily want every person with one share and somebody else with one share being able to nominate them and could perhaps run into the same situation as you run into with elections where you have all kinds of people coming out of the woodwork who are not serious about what they are doing but they get their name on the ballot and maybe get 10 or 15 votes when election times comes. I think we have to look at it company-wise as responsibly as we might look at a provincial or municipal election basis.

Mr. Elston: I was of the same opinion as Mr. Renwick in relation to the chances of a corporation being deluged with information about a particular nominee for a board of directors, I guess. I do not see that the opportunity, once given to a person who does not hold five per cent of the shares, will then encourage every shareholder who has one single share or two shares or three shares in a corporation, to then come out and want to nominate a director.

I think we often times look to situations which have been written up, as I think was mentioned in one of the presentations, concerning the South African boycott issues which were tried to be presented in front of some off the annual meetings of large corporations. I think we tend to think the shareholders who own less than five per cent of the shares of a corporation or whatever, oftentimes or every time will try to elect their own director for that purpose.

That is not the case. I do not think that every person, just because he owns less than five per cent, will want to try and nominate his own director. I have a personal feeling, therefore, that we are not going to be deluged with people wanting to have a circularization of their opinions as to the merits of particular candidates.

As Mr. Renwick was, I was persuaded by the presentation of the task force and I will certainly support this, but note at the same time the amendment which was also submitted, at least in written form from Mr. Spensieri, which would have continued subsection 4 in some fashion, setting out specifically that the proposal may include a nomination of a director.

Those are really all my comments. I just do not think the merit of a nomination and the possibility of being deluged should discourage us from continuing on and conforming one section to the other in terms of our requirements.

Mr. Chairman: I am not clear on your reference to Mr. Spensieri's amendment of subsection 4 coming up. You referred to that. Would you please clarify it?

Mr. Elston: Mr. Renwick's amendment would strike the entire subsection. Mr. Spensieri's would have only eliminated the fact of some qualification of the proposals containing a nomination for election of directors. That is the thrust of the two of them and in fact I think probably a vote on one will almost certainly reflect the vote on the second.

3:20 p.m.

Mr. Spensieri: If I could just elaborate very briefly on what Mr. Elston has said, Mr. Chairman. The reason for wanting a separate subsection for electing the director or permitting the election of directors is that traditionally the power to change the board of directors has been considered the keystone of the rights of shareholders. It would therefore seem important that we maintain the distinction between general proposals as to the conduct of the affairs of the corporation and a proposal which includes a nomination for a director. That is why I would have been introducing the amendment specifically setting out that a proposal may include nomination for the election of directors.

Mr. Hebb: Could I make a technical comment on the wording of your motion? I would thought that it would have been desirable for you to have preserved the last clause of subsection 4 which says: "But this subsection does not preclude nominations being made at a meeting of shareholders." Do you not agree?

Mr. Spensieri: Yes, I agree. That is an oversight. That should continue to include the right to be nominated at the meeting.

Mr. Chairman: We are, however, dealing with Mr. Renwick's motion.

Mr. Renwick: I take it that whether we did it affirmatively, as Mr. Spensieri has indicated, with the addition of that further clause to it or negatively as I have done it by striking it from the bill, we are both in agreement about the objective that we want to achieve. I am content to have my motion put and Mr. Spensieri's motion put. It does not matter to me which route we go because the objective is clear.

Mr. Chairman: Are there any other comments with regard to Mr. Renwick's motion that section 98(4) be struck from the bill and do not stand as part of the bill? All those in favour of the motion please raise your hands. All those opposed to the motion please raise your hands.

Motion negatived.

Mr. Chairman: Mr. Spensieri has moved that section 98(4) be struck out and the following substituted therefor:

"A proposal may include nominations for the election of directors."

Mr. Spensieri: This subsection does not preclude nominations being made at a meeting of shareholders. Without reiterating, it has essentially the same intent as Mr. Renwick's motion.

Mr. Chairman: Are there any other comments with regard to this section or this amendment of Mr. Spensieri.

Mr. Renwick: I certainly support Mr. Spensieri's amendment and I would certainly urge my colleagues and the Conservative Party to reconsider their position on that side. I think the merit of it speaks for itself.

Mr. Elston: I would be interested in the reaction of Mr. Mitchell to doing it in this fashion. Maybe he would like to represent the position of the ministry once again.

Mr. Mitchell: Just let me say, Mr. Elston, this has come about as a result of a great amount of discussion. I have not been convinced in any way that the figure that is here--the five per cent--is not valid at this point.

Mr. Chairman: Mr. Howard or Mr. Wells might want to comment further.

Mr. Howard: Mr. Chairman, you have to bear in mind that we are trying to balance this new scheme of shareholders dealing with shareholder proposals between the interests of the majority shareholders and the minority shareholders. I have been accused in

the preparation of this draft bill of introducing into Ontario a tyranny of the minority shareholders.

This is the fear of the board of trade. Now here, you will understand, at least I hope you will understand from the reading of this section, that at the expense of management and the corporation, or the corporation and the majority shareholders, the shareholders' proposal is going to go out with the proxy solicitation.

Now, if in addition to that, the shareholder wants to nominate, or shareholders want to nominate a director, it seems to me quite reasonable that if they are serious, they should be a group that represent five per cent of the voting shares, if they are going to put management to the expense of including their proxy solicitation with management's proxy solicitation dealing with management's candidate or nominees.

Mr. Elston: It is something of course that the minority shareholder, the person holding less than five per cent, is obligated to front, at least partially, by the fact he is holding some shares.

Mr. Howard: Oh, yes he is part of the organization. He still has the right as an individual shareholder from the floor to nominate directors.

Mr. Elston: I fully understand that. There is no question about that at all.

Mr. Howard: Maybe I have missed some points. Perhaps my colleagues from the bar could help us here if they have anything they want to add.

Mr. Hebb: As I said yesterday I think it is just a straight policy issue and I think you have heard the arguments from both sides.

Mr. Howard: So I would recommend to the ministry that section 98 not be changed.

Mr. Chairman: Are there any other comments with regard to section 98(4), with regard to Mr. Spensieri's amendment? All those in favour of Mr. Spensieri's amendment please raise their hand. All those opposed? The motion fails four to five.

Motion negatived.

Mr. Renwick: Mr. Chairman, could I specifically ask the parliamentary assistant if he could draw to the attention of the minister the brief of the task force and the transcript of the discussion that took place yesterday and today on this specific question so that the minister could have an opportunity, specifically himself, to direct his attention to the points which have been made to see whether or not there is not the obvious merit of some of us on the committee see in it?

Mr. Mitchell: Mr. Renwick, I will be reporting to the

minister on the deliberations that have occurred at the committee here, and I must tell you--

Mr. Renwick: I understand that and I ask you to isolate this one and draw it specifically to his attention.

Mr. Mitchell: Well, you have that commitment. As I have pointed out to all members of the committee, I have not, unlike several of the members of this committee, been in the position since I am not a lawyer, of dealing with this bill. Certainly when one looks initially at the five per cent that is mentioned, one has to say well, is this a magical five per cent? Where does it come from?

I must admit I am taking the best advice of our people within the ministry, who have spent a great deal of time working on this bill, and I think it would be imprudent of me not to, at this point in time, accept their recommendations. But I will isolate this particular portion as you have requested, and ask the minister to have an examination of that point.

Mr. Renwick: Thank you. I would appreciate that.

Mr. Chairman: Thank you. Section 98--

Mr. Mitchell: Mr. Chairman, Mr. Renwick's motion has now been prepared and I--

Mr. Chairman: I was going to finish off section 98 and then go back to that if I might. Section 98(4), are there any other comments with regard to it as proposed in the legislation? On subsections 5 and 6, are there any comments? Shall section 98(4), (5) and (6) carry? Agreed.

Section 98(4), (5) and (6) agreed to.

Mr. Chairman: Section 98(7), I note that the task force has some comment with regard to 7, 8 and 9 and there are amendments. Mr. Renwick, you have an amendment to 98(8).

3:30 p.m.

Mr. Renwick: Mr. Chairman, if I may, I will move both of them because it is the same point on 98(8) and 98(9). I move that subsection 98(8) be amended by inserting after the word "court" the words "or in the case of an offering corporation, the commission."

I further move that subsection 98(9) be amended by inserting after the word "court" the words "or in the case of an offering corporation, the commission."

Mr. Chairman, I made the point yesterday, while it is true it was raised by the task force, nevertheless, taking into account the factors of cost, expedition and efficiency and so on, it did seem to me that the suggestion of an alternative model had some merit and I gave some thought to it. I did think in the case of the offering corporations it was a very sensible suggestion that the commission be used as the body to which the application by the

shareholder be made and leave the other applications to go to the court.

Specifically in the case of the commission, I think it would be within the purview of its jurisdiction dealing with offering corporations. Second, I think it would provide some increase in the efficiency of dealing with the matter, not in the substance of the solution but in the actual process of getting it dealt with, and also I think the costs in such case are likely to be significantly less for the commission than it would perhaps be before the high court. For those reasons I would commend the amendment to section 98(8) and 98(9) which, of course, are identical changes in the two sections which refer to the application of the court.

Mr. Wells: Mr. Chairman, with respect to 98(8) this section deals with an application to restrain the holding of a meeting which is, in essence, an injunction. I don't believe the commission has that power; that is a power reserved to the high court of the province. I don't think we can vest the commission with power to issue a restraining order like this. That is my first comment.

I suppose with respect to subsection 9, it is a question of whether the commission has the resources, for one thing, and of course this was canvassed yesterday at great length. I don't think I want to say any more at this point.

Mr. Chairman: Are there any comment with regard to Mr. Renwick's two amendments?

Mr. Spensieri: Mr. Chairman, I don't think there is anything inherent in a court that would give it powers to grant injunctions, whereas a lesser tribunal couldn't. I think if this statute were to create the power to grant restraining orders or injunctions, then that would certainly be a new conferred power upon the commission. I don't think there is too much to be made of the distinction between a court and a lesser body exercising the same judicial function.

Mr. Chairman: Do the technicians have an opinion as to the capacity of quasi-judicial bodies or other bodies granting injunctions?

Mr. Hebb: I am still looking. I will try to form an opinion in a moment.

Mr. Coombs: I would wonder, and I don't put it any higher than that, if that word "restrain" in the section really does mean injunction in the true sense, whether you don't face a constitutional problem that you are conferring a power of section 98 of the British North America Act court on to a provincially appointed tribunal. That is the only thing that appears off the cuff. But that issue aside, I suppose you can confer any power you want on them.

Mr. Spensieri: It is an injunction pertaining to securities which are a provincial jurisdiction and which has been delegated to the securities commission.

Mr. Coombs: I suppose there is another aspect to that, but the force that an injunction of a court of competent jurisdiction would have is the force that is conferred by the court's power to punish for contempt of its order. One wonders what power the commission would have if it were granted this power under this statute to enforce somebody who simply ignored its order. I do not think you can be in contempt of the commission except in a colloquial sense.

Mr. Chairman: Mr. Renwick, do you wish to respond to the comments as to the jurisdiction?

Mr. Renwick: I respond only in the sense that we were aware of the problems with respect to the British North America Act specifically at the time when the Supreme Court of Canada declared the Residential Tenancies Act unconstitutional because of that attempt to give powers to a provincially created board that were clearly reserved to the traditional superior courts.

I think you will find, however, in the Securities Act a number of powers of restraint already vested in the securities commission. This is to restrain the meeting to be held. I would be prepared to take my constitutional chances on whether or not the restraint of a company meeting would be held, because of the tradition of the equity courts in England, to be a matter specifically reserved for the jurisdiction of the courts. I would take my chances on that, on the assumption that an alleviating provisions such as this is not likely to run into that kind of a challenge.

Mr. Mitchell: I have one comment, and again I lack association with the law. My understanding is that this Legislature cannot confer that type of authority on the securities commission.

Mr. Renwick: The commission does restrain any number of things. Whether or not it can restrain a meeting, I would take my chances on that and I would be glad to argue it on behalf of the government if it were challenged.

Mr. Coombs: To take a somewhat different side of the issue, if it were proposed to make that amendment, as I am reading it, it seems to say that the court would no longer have jurisdiction. Perhaps there should be concurrent jurisdiction.

Mr. Renwick: I had thought the others to say the court or the commission. I had thought of that as a possibility and I would accept that too.

Mr. Hebb: Mr. Chairman, I finally found what I was looking for. We had, as I thought, already addressed the issue in the bill. If I could refer you to section 251, the remedies portion of the bill, you will see that there is provision there for the commission to apply to the court, and the court may, upon application, make any order it thinks fit, including an order restraining the holding of a meeting. This is section 251(2) of the bill.

Mr. Elston: Do you mean the commission from the initial

application? Then if the someone wanted to proceed with the meeting, the commission could actually apply as well.

Mr. Hebb: Yes. I cannot speak to the background of the development of this provision, but it does look as if this has been addressed previously.

I am sorry, I was too brief. Jim Spence points out to me, or mentions, that this is confined to a misleading proxy circular. I appreciate that. My reason for mentioning it was that I thought it was an example of a similar sort of situation. It does not cover this situation. When I said it had been addressed, I just meant it perhaps as a precedent for how we might approach the type of situation that was before us.

Mr. Chairman: Are there any other comments with regard to Mr. Renwick's amendments to sections 98(8) and 98(9), in essence changing the word "court" to "commission"?

Mr. Elston: You said changing "court" to "commission." I think he is inserting words after the word "court."

3:40 p.m.

Mr. Chairman: I am sorry, that is correct. Any other comments? All those in favour of Mr. Renwick's amendments please raise their hands. All those opposed please raise their hands.

Motion negatived.

Section 98(7) to (11), inclusive, agreed to.

Mr. Mitchell: Mr. Chairman, just before we go back to 45. I believe there was a stand-down on 48. Is that right?

Mr. Chairman: There was a stand-down on 45(4) and 48(2) which we are going to deal with now.

Mr. Mitchell: May we hold the stand-down on 48 until tomorrow's deliberations so that we can be sure everything is correct on what is put forward?

Mr. Chairman: Is it satisfactory with the committee to stand down 48(2) until tomorrow? Yes. Then shall we go back to the stood-down section 45(4)?

Mr. Elston: Mr. Chairman, we did not deal with section 98 in its entirety.

Mr. Chairman: It was not amended. It went through my mind in wondering whether I need to or not. Just to be sure, shall section 98 in its entirety carry?

Section 98 agreed to.

Mr. Chairman: It went through my mind, Mr. Elston, whether we had amended or not amended it. I was not sure of that.

On section 45:

Mr. Mitchell: Mr. Chairman, might I just say that our staff would recommend supporting the reverted motion of Mr. Renwick to that?

Mr. Chairman: Mr. Renwick moves that section 45(4) be struck out and the following substituted therefor:

"Where, upon the application of a body corporate incorporated otherwise than under the laws of Canada, a province or a territory the commission is satisfied that to do so would not be prejudicial to the public interest, the commission may exempt, subject to such terms and conditions as the commission may impose, a trust indenture from this part."

Mr. Hebb: I know I am expressing a minority view, but maybe I could just add one thing to what I said earlier about the reason the bar association was seeking the broader provision that we now have, which would include the situation where an Ontario corporation was issuing debt securities outside of Ontario and had no connection with the province of Ontario.

It is our view that conceptually this is really securities law. Just as we rely basically on the laws of the foreign jurisdiction to police the sale of the shares in other jurisdictions, we do not see that Ontario has a major interest in that. Similarly, we would say with respect to the trust indentures provisions that the foreign law should have the primary interest about standards of care and so on in connection with the issue of the securities.

It is because we are coming from that philosophical perspective that we are unhappy with this limitation that Mr. Renwick is suggesting and which the ministry is prepared to accept. I thought I would put that on the table. You may well disagree with this point of view and say it is corporations law. We see it primarily as securities law because it is directly related to the issue of debt securities outside the province of Ontario.

Mr. Mitchell: If I may go back to the point you were making, you accepted the fact earlier that it was rather broad as it exists. The recommendation you put forward, as I recall at the time, would have been worded as subject to such regulations and so on.

Mr. Hebb: Yes.

Mr. Mitchell: This amendment was prepared with our staff assistant and I have not had the opportunity to raise the question with Mr. Renwick as to whether inserting the regulation clause in there would be more acceptable. I think either would be acceptable to us.

Mr. Renwick: The philosophical, if one could dignify it with that term, or conceptual way of looking at it is that I do think that if an Ontario corporation as such is issuing its securities--and I do not care where or how--then we have a

responsibility to see that people are protected in accordance with the law governing the corporation. It has an aspect of security law as well, but I think it has a very real aspect that if we launch an organization on the world and it happens to decide to conduct most of its business outside of the province, nevertheless, we should either require it to discontinue or to comply with what are very reasonable provisions designed to cover very serious evils which existed prior to their introduction.

Rather than to be into a contrasting philosophical attitude about it, my view would be that I would like to see this particular amendment passed today; then it would appear in the bill as printed as it would come back to the House. If, between now and the time it comes back to the House, the bar wishes to make written submission about some other way of expressing the limitation that would be more adequate, then that could be done in committee of the whole House after a brief informal consultation with members of the committee. It was the breadth of the exemption that was my fundamental concern.

This has narrowed it down to cover certainly a significant part of the area where it would be appropriate to have an exemption. If it is to be somewhat further broadened, then I am open to hearing about it, and there would be plenty of time between now and committee of the whole House to deal with it. If we pass it this way, it then means that at least we have drawn attention to the point and it will demand a response if somebody feels that it is too restrictive.

Mr. Howard: I am prepared to recommend to the ministry support for Mr. Renwick's amendment. Perhaps many members have forgotten this, but Harry Bray, vice-chairman of the securities commission, has urged upon me the repeal of this part IV on indenture trustees and that this be incorporated in a separate act, and also that part V, the part dealing with investment securities, be repealed and replaced with a fresh act. These are two items of legislation that we will be dealing with in the future. I cannot pin it down to the time, but at the earliest convenience before I retire it will be the next item that we will be dealing with. Maybe it should go to the select committee on company law.

I agree with Harry Bray that this should be the subject of a separate act. It has got nothing to do with corporate law.

3:50 p.m.

Mr. Chairman: Are there any other comments with regard to Mr. Renwick's amendment to section 45(4)? All those in favour of the amendment, please raise your hands. All those opposed?

Motion agreed to.

Section 45, as amended, agreed to.

Mr. Chairman: We have stood down section 48(2) as remaining. May we now revert to sections 99 to 103, inclusive? Are there any comments in regard to those sections?

Sections 99 to 103, inclusive, agreed to.

On section 104:

Mr. Chairman: Are there any comments with regard to subsections 1 to 3, inclusive? Shall subsections 1 to 3 of section 104 carry? Carried.

Mr. Mitchell moves that section 104(4) of the bill be amended by adding at the beginning thereof, "Subject to subsection (3)."

Motion agreed to.

Mr. Chairman: Is there any discussion or comment on subsections 5 and 6? Carried.

Section 104 agreed to.

On sections 105 to 110, inclusive:

Mr. Chairman: Are there any comments with regard to sections 105 to 110, inclusive, right through the unanimous shareholder agreement and the beginning of proxies?

Mr. Renwick: On section 107--it is really a question perhaps to Mr. Hebb--I take it that in no way could a unanimous shareholder agreement restrict the transfer of shares? That comes back to the point we had before. I take it a unanimous shareholder agreement could not restrict the transfer of shares, even though a person may take subject to the agreement as a transferee.

Mr. Hebb: The definition of a unanimous shareholder agreement is essentially contained in the second subsection, as you no doubt noticed. I think that is right in the conventional sense of restriction. Do you want to add to that, Maurice, in terms of what you had to say earlier?

Mr. Coombs: No. I think that is correct. I suppose in effect you could create rights which would inhibit transfer, but they are essentially private rights, rather than what you might think of as corporate constitutional rights.

Mr. Renwick: So far as the actual transfer of the shares on the books is concerned, that is not inhibited.

Mr. Coombs: I don't believe so, no.

Mr. Chairman: Are we speaking now with regard to the NEP or generally shares of all types?

Mr Renwick: Just generally.

Sections 105 to 110, inclusive, agreed to.

On section 111:

Mr. Chairman: On section 111, the Ariadne Group had comments and Mr. Mitchell has an amendment.

Mr. Mitchell moves that section 111(1) of the bill be struck out and the following substituted therefor:

"(1) No person shall solicit proxies in respect of an offering corporation unless,

"(a) in the case of solicitation by or on behalf of the management of the corporation, a management information circular in prescribed form, either as an appendix to or as a separate document accompanying the notice of the meeting; or

"(b) in the case of any other solicitation a dissident's information circular in prescribed form is sent to the auditor of the corporation, to each shareholder whose proxy is solicited and, if clause (b) applies, to the corporation."

Motion agreed to.

Section 111 agreed to.

On section 112:

Mr. Chairman: Mr. Renwick moves that section 112 not stand as part of the bill.

Mr. Renwick: Mr. Chairman, I move that simply because I can't conceive of what kinds of circumstances would be that the commission would be asked to exempt any offering corporation from the provisions of section 110; that is, "The management of an offering corporation shall, concurrently with or prior to sending notice of a meeting of shareholders, send a form of proxy to each shareholder who is entitled to receive notice of the meeting."

I put the amendment for the same reason I put the earlier amendment. What is the scope of that exempting power? It seems to me that an offering corporation should be obligated, as we tried to provide in section 110. Perhaps somebody can tell me what the exceptional circumstances would be that would justify the commission coming to the conclusion that 110 was not going to apply.

My same comments apply to section 111 as amended, as we just passed it.

4 p.m.

Mr. Chairman: Mr. Mitchell or Mr. Howard, do you wish to respond to Mr. Renwick's motion to delete section 112?

Mr. Howard: I have no notations here with respect to section 112. I think it is carried forward from the existing bill, Mr. Renwick, probably with a minor amendment.

Mr. Wells: This section seems to have been around for a long time. I am not familiar with its use at all by the commission and perhaps the members of the committee could assist us in that regard. I think Mr. Hebb had something to say.

Mr. Hebb: I think the use would be quite rare. It might be noted that in addition to the point that has been made, that it does not represent a change from the existing law, the provision is paralleled in the Ontario Securities Act with reference to non-Ontario corporations. I think it is there to cover the oddball situation. I am not able to come up readily with an example of a corporation that would be seeking a complete exemption from proxy circular requirements, but it does seem to me there might be some case made or occasional circumstance for relief from a particular disclosure requirement of the information circular provisions. I think that could also be embraced by the exemption provision.

Again I would say it is just for flexibility. If you look through the Securities Act and the various areas that are essentially administered by the Ontario Securities Commission, there normally is a basis for the securities commission to provide an exemption from what are normally the rules that you have to follow. I do not think there is anything more than that intended here. It is here to cover the very occasional circumstance where somebody can make a case for exemption from the conventional requirements.

Mr. Renwick: Mr. Chairman, I am not particularly anxious that the amendment be put. I wanted to raise the issues that were involved in it. I would be very interested if somebody would take the trouble to ask the commission how many times they can recall that this has ever been used. I would not be surprised if it has not been used, and if it has not been used and it has been there for some considerable period of time, there is a very real reason to believe that it is an unnecessary appendage in the act, particularly when we are talking about this business of the flat obligation in section 110 of the proposed bill about sending a form of proxy to each shareholder who is entitled to receive notice of the meeting. It is difficult enough to get shareholders to respond in this day and age, and if you omit to send them the proxy as well, then you are going to cut down what little shareholder participation there is.

Mr. Hebb: Mr. Chairman, one other point: Maurice Coombs suggested I should point out to Mr. Renwick that the potential for exemption applies not only to the management proxy circular but also to the requirement to provide a dissident's proxy circular.

Mr. Coombs: I suppose you might also think of what Mr. Hebb refers to as oddball situations. In a situation where shareholder records were inadequate or incomplete or lost or there has been some sort of fraud or whatever, you might want to do your proxy solicitations by newspaper if there is shortness of time. I suspect it is that kind of thing it is designed to cover, but I know of no case in which it has been used.

Mr. Renwick: I would like to leave it. I am not going to ask that the amendment be put. I have raised the point, we have had this brief discussion about it. It would be interesting to know whether the commission has some information on that.

Mr. Chairman: We will try to answer your question in the morning. So your motion to delete section 112 is withdrawn.

Section 112 agreed to.

Section 112 agreed to.

On section 114:

Mr. Chairman: There are comments from the task force on section 114(1).

Mr. Renwick: I move that section 114(1) be amended by adding thereto the words "consistent with generally accepted concepts of corporate conduct and social responsibility." The elegance of that phrase has nothing to do with me. Of course, I selected the words "generally accepted" because they have been held by the accounting profession over the years, and the "concepts of corporate conduct and social responsibility" are stolen from the social responsibility and corporate conduct policy statement of the Canadian Imperial Bank of Commerce, which I think succinctly puts the point.

In the foreword to that statement by the bank it states, "For well over a century, the Canadian Imperial Bank of Commerce has conducted its business in accordance with a straightforward credo: We will endeavour to operate in a manner that is ethically and socially responsible and which contributes to what we believe to be the national interest. We have always accepted our obligation to apply moral and ethical judgements to the conduct of the bank's affairs."

Then it goes on: "For the most part, this principle has been maintained as a matter of good faith, without written documentation. However, the simplicities of the past have become the complexities of the present. With large business organizations such as ours operating throughout the world in a climate of changing social and personal ethics, it is important that we should go on record in terms of defining our concepts of corporate conduct and social responsibility."

So I thought those were very good words, "concepts of corporate conduct and social responsibility." I think it is time, not only because of the submission made by the task force yesterday, that we begin to recognize the responsibility of the directors of corporations in the area of social responsibility and corporate conduct. I thought this was a felicitous way of putting that principle to it, and I think I need say no more. There may be those on the committee who believe that this is an idea whose time has not yet come, but come it will, and I think it would be interesting for Ontario perhaps to pioneer and in an important field.

Mr. Howard: Mr. Chairman, generally accepted accounting principles, of course, are the rules by which the accounting profession lives. What are generally accepted concepts of corporate conduct and social responsibility? There is no guidance there whatsoever; it is every man's own opinion of what--

Mr. Renwick: I recognize that, and that would be the

pioneering nature of that because 25, 30, or 40 years ago some person could have said, "What are generally accepted accounting principles?" We could have had the same discussion. There has been an immense evolution of accounting principles with respect to becoming generally accepted. There certainly are, as indicated by this statement and as we had indicated to us from the task force, a number of corporations of significant proportions that are making statements about this--

Mr. Howard: Of different kinds.

Mr. Renwick: --and it would not be beyond the wit of directors of corporations in Ontario to give some sense and meaning to the term "generally accepted concepts of corporate conduct and social responsibility."

I am a great believer in the evolution of concepts, and I think if we start, it will have a content that will develop over time.

4:10 p.m.

Mr. Howard: All I am saying is I cannot recommend to the minister that we impose, through the Legislature, within the law, concepts that do not exist.

Generally accepted accounting principles exist; so throughout the bill we refer to them, but I cannot recommend that we introduce something that does not exist. Every corporation would have its own ideas of what this concept should be; though granted, in the future, in the evolution of time, this is going to come. But I think, to use your words, or what you were hinting at, it is a little premature at this period of history.

Mr. Mitchell: I guess the only concern I have here, Mr. Chairman, is that I am not sure if this were to be put to the test, how a judgement would be made on it. It gives me some degree of concern. There are, as Mr. Howard has said, generally accepted accounting principles, but we have yet to see generally accepted concepts of corporate conduct, and if it had to be tested, I would not want to be the one to be sitting in judgement on whose decision it is.

Mr. Hebb: There is a technical comment here that perhaps we could develop. The point was made very clear by the churches, as I understood it, that the social responsibility code was one that was developed by the corporation and applied by the corporation against the previously developed code.

The way this is drafted, it talks about generally accepted concepts of social responsibility; so I think it may go further than the churches were suggesting. In other words, it would be the individual corporation's social responsibility concepts, as opposed to generally accepted concepts.

Mr. Mitchell: I have a great deal of difficulty with accepting any change to this particular section.

Mr. Chairman: Are there any other comments?

All those in favour of Mr. Renwick's amendment, please raise your hand. All those opposed, please raise your hand.

The vote being tied, the chair, by tradition, must vote with the government bill, the status quo, the legislation as it is.

Motion negatived.

Mr. Chairman: You will appreciate, with the excitement of the spring and fall sittings, that I was well versed in the chair having--this is the first time the chair has been forced to break a tie.

Mr. Renwick: I can understand that you are voting against your conscience in adhering to principle. What could we call it? A moral victory.

Mr. Chairman: I referred only to precedent, Mr. Renwick.

Shall section 114(1) carry? Carried.

Shall section 114(2) carry? Carried.

On section 114(3) there are comments by the Ariadne Group and Mr. Renwick and Mr. Spensieri, and Mr. Spensieri's was received first, I believe.

Mr. Renwick: Fine. That is quite agreeable with me.

Mr. Chairman: You have seen each other's amendments. Mr. Spensieri, shall we deal with yours first?

Mr. Spensieri: Mr. Chairman, I move that section 114(3) be struck out and the following substituted therefor: "At least one third of the directors of an offering corporation shall not be officers or employees of the corporation or any of its affiliates or independent contractors who have provided goods or services to the corporation or any of its affiliates within a period of 12 months prior to the election of directors."

Essentially, this is in response to the submissions made in the various exhibits, and also to my own understanding of the situation, which is essentially that the legislation has accepted the concept that one third of the board of directors must be an independent board, and to make the board truly independent we should exclude people who, in any way, rely for their livelihood on the continuance of goodwill of that corporation. I think independence implies a lack of financial constraints, lack of financial persuasion, and it would appear to me that, as humble as the effort in drafting might be, that it probably will achieve its objective of ultimate independence. For this reason, I would ask for its adoption.

Mr. Renwick: Mr. Chairman, I think Mr. Spensieri's amendment speaks to the same problem that we are both trying to deal with. I would certainly want to support his amendment as he

has put it. For the reasons which he has stated, the objective is the same as for the one which I will move subsequently if Mr. Spensieri's is not passed.

Mr. Chairman: Are there any other comments with regard to Mr. Spensieri's motion? You will remember there was a considerable amount of discussion by the Ariadne Group and various groups, also the task force on the churches. There has been a considerable amount of discussion and thought given to the independence of the one third of the offering corporation's directors. Mr. MacQuarrie.

Mr. MacQuarrie: I wonder if we could hear from the ministry in connection with this.

Mr. Mitchell: Mr. Howard perhaps may wish to comment, but there was a lot of discussion with regard to this section yesterday. I have not, to this time, been convinced that this particular section should be changed.

Mr. Chairman: Mr. Howard, do you wish to add to Mr. Mitchell's comments?

Mr. Howard: Mr. Chairman, all I can say is that personally I would undertake that this section be reviewed at the earliest opportunity after the bill has been enacted. There are a number of sections that are rather complex and should be looked at again, possibly in the light of experience. I have recognized from the time of the first draft that something should be done in this area. All I can do is undertake that we will look at it again very carefully with the assistance of the practising bar.

Mr. Chairman: Have the solicitors for the Canadian Bar Association any comment as to what they have found, what their experience is? Can you assist us in a technical way here?

Mr. Hebb: I made some general comments yesterday. I guess I just have to reiterate what I said yesterday.

I recognize that there is concern about directors that may be perceived as a conflict of interest. I think it is a rather difficult matter to deal with in a few minutes. It is the sort of thing that you might ask some people to go away and spend a little time thinking about it and come back and make some recommendations. I guess I really cannot say anything more than that except that I do agree that there are questions being raised about the position, particularly of the lawyer who does a considerable amount of work for the corporation and then sits on the board. I know our bar association also looked at the lawyer who does an occasional thing for the corporation, a very small thing for the corporation, and is thereby disqualified. It is an example of the sort of problem you have.

As I said yesterday, you have the businessman, and maybe his company sells a very small amount to the company on whose board he might sit. Does that disqualify him? Does there have to be a certain size to the conflict before it becomes important?

I know Mr. Renwick in his amendment has tried to address that

issue of materiality. I guess all I am saying from my point of view is that I recognize it is an area of concern, but I have real difficulty in coming up with a solution in a short period of time. I think Mr. Howard's suggestion of taking a further look at it at an early stage would be a better approach.

4:20 p.m.

Mr. Mitchell: In fact, Mr. Chairman, that was a commitment that was made yesterday when the groups were making their presentations--that reviews would be carried out with people who had interest in particular sections. I guess at this point that is our commitment.

Mr. MacQuarrie: I have some difficulty as has already been outlined by Mr. Spensieri's use of the words "independent contractors who provided goods or services." I tried to identify in my mind what sort of contractors could be involved. There was a conflict of interest in municipal law where a member of council who operated a general store in the town sold a pair of shoes to the fire department. There was some question as to whether he qualified or not and had a conflict of interest and this sort of thing. So long as interest was properly declared, there was no real impediment to his independence in any way, shape or form.

It tends to resolve itself to my mind into a question of degree of dependence on the corporation. By adopting this amendment, we could be eliminating people who might inadvertently--a director of another corporation, a president or an officer of another corporation who might sell oil or something else to the company involved. Are we into a conflict of interest in that situation? The ramifications of the term "independent contractors who provided goods or services to the corporation or any of its affiliates" seems to me to be a pretty sweeping sort of elimination yet at the same time when a person is tied up to a very financial extent with the corporation I can see him being excluded, certainly. The wording here certainly gives me some trouble and I could not support the amendment.

Mr. Elston: If Mr. Spensieri would like to sort of respond directly, maybe this is a good time for him.

Mr. Spensieri: Yes, very briefly, Mr. Chairman. The thought has been advanced by Mr. MacQuarrie to indicate that we are trying to exclude these people with potential affiliations from the board. That is not the case. There is a two thirds component which is wide open. All I am really arguing for in this amendment is that one third of the board be sort of pristine, if you like, in the sense that they be absolutely devoid of even any potential for interest. It is this select one third that I am really addressing myself to in this amendment.

As far as the independent contractor is concerned, I think I am using it in its generally accepted legal sense as being anyone who is not a permanent employee or an employee in any sense of the word. I think it is just a generic legal term used to indicate anyone who provides legal services, accounting services, any kind

of outside services. I just want to be sure we were inside as far as understanding what I was intending to get at there. I didn't mean to suggest a contractor and perhaps (inaudible).

Mr. Elston: I would just like to say very very briefly that this may be another situation where it would be appropriate if the language is somewhat loose in terms of the concerns of the other members of the committee that we might put this particular amendment in the bill now and between now and when it is dealt with in committee of the whole House, we could strengthen it or have it reviewed extensively by the people. That, in my understanding, will be at least two or three months from now.

The part that concerns me is that the commitment having been made--and I appreciate the commitment--it will not take place until at least one year after this is passed by the Legislature. It could be some three or four years down the road by the time we have any experience if that is what we are going to be dealing with in relation to this section.

When or if we decide to set this down for the time being, it could be a considerable length of time before we get back to really taking a serious look at tightening up this one third--which policy has already decided must be independent from the corporation. So to partially reiterate some of the comments of my colleague Mr. Spensieri, I think we should take the step here and try to preserve the policy that has already been enunciated by the group and try to preserve independence.

Mr. Chairman: All those in favour of Mr. Spensieri's amendment, please raise their hands.

All those opposed, please raise your hands.

The motion fails, four to five.

Motion negatived.

Mr. Chairman: Maybe we should stop now. I leave it to the committee whether we deal with the other amendment to 114(3).

I do wish to have our procedure discussed tomorrow morning and to complete the clause by clause tomorrow and on Monday our plans for next week with the Children's Law Reform Act. I would like to do that tonight. A lot of people have a lot of plans to put into place probably tonight by telephone depending on tomorrow and Monday. So would you bear with me and no one recognize the clock for a couple of minutes.

Mr. Chairman: Mr. Renwick moves that section 114(3) be amended to read as follows: "At least one third of the directors of an offering corporation shall be independent of the corporation," and that section 114 be further amended by adding thereto subsection 114(4) as follows: "For the purpose of subsection 3, a person is not independent if he is an officer, an employee or a person who is retained as a consultant or professional advisor of the corporation or any of its affiliates or any other person who

directly or indirectly would have a material conflict of interest if elected a director."

Mr. Renwick: We have had the discussion generally on the point. I think it is important that the amendments be put for the sake of the record both in the view of the commitment by the ministry to look at the matter but also to reflect very clearly the concern that we have about it which has been expressed. This is particularly so in light of the evolution of this section since the time the draft bill surfaced. There has been significant curtailment of what was then proposed. As Mr. Hebb has correctly stated, I have tried to reach out to the point that Mr. MacQuarrie was concerned about, about how to delimit in a satisfactory way who is independent.

The first point is that we are only talking about one third. Second, I have gone directly to the term "independent" to emphasize the essential ingredient that is involved. Then in the proposed additional subsection I have tried to delimit the persons who are not independent in a way which I think is capable of ascertainment, particularly as the term "material conflict of interest" is not one which is unknown to the field of corporate law. I put it forward at least as a proposal from which we can perhaps ultimately come up with the answer to the concerns which have been expressed. I would like the motion to be put so the record would show the discussion.

Mr. Chairman: Mr. Howard, do you wish to respond to Mr. Renwick other than to reiterate your comments to Mr. Spensieri?

Mr. Howard: That is about all I can do--to undertake that we will look at this whole area because it is of personal interest to me also.

4:30 p.m.

Mr. Hebb: I have a question. It is not clear to me from reading Mr. Renwick's draft whether he will be prepared to apply the materiality standard to the consultant and the professional adviser as well as to the others. I would be interested to know what his thinking is in that regard.

Mr. Renwick: My intention was to rule them out automatically, but it may have a defect in the drafting of it. It was not my intention that it would apply, if that is responsive to your question.

Mr. Chairman: Any other comments with regard to Mr. Renwick's amendment? All those in favour of Mr. Renwick's amendment please raise their hands. All those opposed.

Motion negatived.

Mr. Chairman: Is there any other discussion with regard to section 114(3)? Shall section 114(3) carry? Carried.

May we leave it there for this evening? May I have the guidance of the committee with regard to the procedure tomorrow and Monday, keeping in mind that we are scheduled to sit for the

Children's Law Reform Act on Monday. But I would ask the clerk to advise me--the witnesses were few and far between who were responding and who wished to appear before us as of the early part of this week. I might ask the clerk to report on how many people had confirmed that they wished to speak to us Monday.

Clerk of the Committee: I have not spoken to Mr. Forsyth's secretary today, but there is a commitment from 10 o'clock to 11 o'clock and at 11 o'clock, and at 2 p.m. and 2:30 p.m. on Monday. They are already made--the Canadian Bar Association.

Mr. Chairman: Is that it?

Clerk of the Committee: That is all I have. I have not spoken to her today on this subject. She may have more.

Mr. Renwick: Has Justice for Children responded?

Clerk of the Committee: This is on the Justice for Children. This is for Monday.

Mr. Chairman: You are speaking of an organization though, this Justice for Children.

Clerk of the Committee: Are you?

Mr. Renwick: Yes.

Clerk of the Committee: Just a minute. Here are the people that we have contacted. They are all here, and all of the comments.

Mr. Chairman: Justice for Children has been contacted and the response has not been--

Clerk of the Committee: They are going to come. They will need an hour for their presentation. He indicated Wednesday, January 13, would be a good day for him.

Mr. Mitchell: Mr. Chairman, it has been in the past through the courtesy of the members of the committee that--out of if you want to call it the basic Metropolitan Toronto area--they have recognized the problems that members have in getting back to and from their constituencies. It is safe to say it was the understanding--I know I have talked to other members--that we would not be sitting Monday. We did not sit this previous Monday.

Clerk of the Committee: Yes, you did.

Mr. Mitchell: No, we did not.

Interjection: No, not Monday.

Mr. Mitchell: We had been scheduled to sit Monday. The fact of the matter is we have at this point completed section 114 of this particular Business Corporations Act, and we have been moving along quite readily thanks to the committee members. We do have approximately another 150-odd clauses to go through. I am not

sure there are that many amendments to come forward--however, we do have a length of time.

Mr. Renwick: We have all night to think up some more.

Mr. Mitchell: Yes, that is right. With respect to Mr. Laughren, and Mr. Hennessy, and Mr. Gordon, who have difficulty in making connections--

Mr. Laughren: Why this sudden concern?

Mr. Mitchell: I am expressing the concern. Let us not be facetious about it. They have difficulty in making connection with aircraft flights, and so on, to get them to their constituencies. It was our understanding, rightly or wrongly, that we would not be sitting Monday, and I would request the chair to examine whether in fact the Monday session is necessary.

At least could we waive the Monday morning session to allow the members, not only to have some time in their constituency, but also quite honestly, with their families? I am obviously being very selfish on my own part. It means the difference of whether one leaves early Sunday to come down or whether they have a chance to come later on the Sunday. I am being selfish, I honestly admit that.

Mr. Chairman: I think the reason for the Monday past not being scheduled was because it was immediately following New Year's. The reason this coming Monday was scheduled was that the clerk Mr. Forsyth and I believed it would probably be on more of an emotional appeal and there could be a great number of witnesses wishing to appear before us. That has not materialized at all with regard to the Children's Law Reform Act. So therefore, in case the committee did not wish to be accused of cutting short witnesses, to give itself a holiday, that is why Monday was scheduled.

In view of the sparse number of witnesses, it would be very easy to not sit Monday if that is your wish, providing we have the bill in front of us and it is going to be finished tomorrow.

Mr. Renwick: I would just assume the bill would be finished tomorrow.

Mr. Chairman: Yes. Is it going to be finished in the morning?

Mr. Haggerty: You are the one holding the keys.

Mr. Chairman: Is it going to finished in the morning for those people to make flights at noon?

Mr. Renwick: I do not see any reason why we cannot be finished by noon or one o'clock.

Mr. Mitchell: Mr. Chairman, notwithstanding the comments that have been made, may I ask you as chairman of the committee to ascertain--and you would have to contact Mr. Forsyth for this--but if you find that the schedule for next week is easily adjustable, I would appreciate the opportunity, and I am sure other members

would, if we could defer sitting in the morning and go to an afternoon session as a minimum on Monday. I would prefer Tuesday myself.

Mr. Chairman: Fine, then unless you hear to the contrary, we will move those on to Tuesday. We will not sit Monday. However, if you do not move along expeditiously tomorrow, you will be back on Bill 6, Monday. We do contemplate being finished by noon. Is that a reasonable expectation?

Mr. Renwick: I think we should recess at the very latest at one o'clock. I assume we will be finished at 12:30.

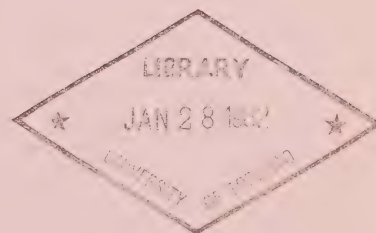
The committee adjourned at 4:40 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BUSINESS CORPORATIONS ACT

FRIDAY, JANUARY 8, 1982



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Treleaven, R. L. (Oxford PC)
Andrewes, P. W. (Lincoln PC)
Breithaupt, J. R. (Kitchener L)
Eaton, R. G. (Middlesex PC)
Elston, M. J. (Huron-Bruce L)
Gordon, J. K. (Sudbury PC)
Laughren, F. (Nickel Belt NDP)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Piché, R. L. (Cochrane North PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M. A. (Yorkview L)

Substitutions:

Cunningham, E. G. (Wentworth North L) for Mr. Breithaupt
Hennessey, M. (Fort William PC) for Mr. Andrewes
Kolyn, A. (Lakeshore PC) for Mr. Piché

Clerk pro tem: Nokes, F.

From the Ministry of Consumer and Commercial Relations:

Howard, B. C., Executive Director, Companies Division
Mitchell, R. C., Parliamentary Assistant
Wells, E. J. K., Director, Company Law Branch

From the Ministry of the Attorney General:

Yurkow, R., Legislative Counsel

Witnesses:

Knight, D., Chairman, Corporation and Securities Law Committee,
Institute of Chartered Accountants of Ontario

From the Canadian Bar Association Committee on Bill 6:

Coombs, M.
Hebb, L.
Levin, J.
Westlake, B.

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Friday, January 8, 1982

The committee met at 10:15 a.m. in committee room No. 1.

BUSINESS CORPORATIONS ACT
(concluded)

Resuming consideration of Bill 6, An Act to revise the Business Corporations Act.

Mr. Chairman: We have a quorum. Gentlemen, shall we carry on? Mr. Renwick had some question about section 112 yesterday and Mr. Wells has some kind of little answer about the exemption order in section 112. Mr. Wells.

Mr. Wells: Thank you, Mr. Chairman. I was speaking with Keith Boast, the legal adviser to the commission, this morning and he advised me that in 1980 approximately 25 orders of exemption were made and I can break it down into some categories. The numbers won't add up to 25, but in essence there were some problems with corporations in other states and problems there, American corporations. About half of the exemptions had to do with movie promotions and they were given exemptions subject to conditions that if in fact there was a meeting an information circular and proxy material be sent out, but normally they aren't.

A couple of corporations were with less than 15 shareholders or they were inactive and were given exemptions subject to no material change taking place in their status, and one corporation which became a wholly owned subsidiary of a chartered bank was given an exemption in that year.

In 1981, there were 19 exemptions, again about 11 movies. A couple of banks for technical reasons had to get an exemption because the regulations under the Bank Act, while they were told to comply with those regulations, were not in fact enforced. There was a project financing--that would be similar to a movie exemption--and two corporations got special dispensation because of the postal disruption so that they could give notice to their shareholders of the meeting by various other means, by courier or whatever and notices in newspapers.

I hope that will be of some assistance to the members.

Mr. Chairman: Thank you, Mr. Wells. Does that answer the question you raised yesterday?

Mr. Renwick: Yes, I just wondered about the use that was made of the provision.

Mr. Chairman: Thank you. Gentlemen, we left off with section 115. At the end, we had carried 114. Are there any comments or questions with regard to sections 115 to 122 inclusive?

Mr. Renwick: I am always delighted to know that a director ceases to be a director when he dies.

Sections 115 to 122, inclusive, agreed to.

Mr. Chairman: The board of trade had a comment on 123.

Mr. Mitchell: We have no proposed changes, Mr. Chairman.

Section 123 agreed to.

Sections 124 to 129, inclusive, agreed to.

10:20 a.m.

On section 130:

Mr. Chairman: Mr. Mitchell moves that sections 130(1) and (2) of the bill be struck out and the following substituted therefor:

"1. The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become due while they are directors for services performed for the corporation and for the vacation pay accrued for not more than 12 months under the Employment Standards Act, and the regulations thereunder, or under any collective agreement made by the corporation.

"2. A director is liable under subsection 1 only if, (a) he is sued while he is a director or within two years after he ceases to be a director, and (b) the action against the director is commenced within six months after the debts became payable, and (i) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part, or (ii) before or after the action is commenced the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the Bankruptcy Act Canada, or a receiving order under the Bankruptcy Act Canada is made against it, and in any such case the claim for the debts is proved."

Mr. Mitchell further moves that section 130(3) be amended by striking out "clause (2)(a)" in the first line and inserting in lieu thereof "clause (2)(b)."

Mr. Renwick: I am pleased the ministry took the suggestion I made on second reading, that the ancient section that was in there had not been looked at for a long time. That is not surprising because that is about the only place in the act where it refers to the people who work for the corporation apart from those who are shareholders. I felt it was extremely archaic and I am pleased the ministry accepted the idea of bringing it up to date.

As you know, I have a further amendment to this section but I have no problem with the section with the changes as proposed.

Mr. Elston: I have a couple of things in the form of a question. In looking at the two-year limitation period and in

addition the six-month limitation period, I am wondering how those two would work in practice. I am wondering if what we are doing is saying that the six-month limitation period is the one that is going to be the effective one.

Mr. Spensieri and I were considering in our own minds whether during this situation and under these circumstances you would ever get past the six-month period. I would imagine a debt to the employee would be in the form of wages in most cases and I can't imagine there ever being a time when we would go that two years.

Mr. Westlake: The two years relates to two years after he ceases to be a director, so that would involve a person who had formerly been a director, say a year before the event.

Mr. Elston: But you would never go anywhere past the six-month period because if the debt became payable to the employee, it would be for his work. I would expect that you would have to take the action within six months for that employee to recover his wages against any director at any time.

Mr. Westlake: That is correct. That is an overriding provision, but you can also, as I read it, apply it to current directors and to those who are directors within the preceding two years. Is that a correct reading?

Mr. Elston: The idea behind that is that the decisions which were being made two years ago, are going to be materially affecting the ability of the company to pay a year and a half later or two years later.

Mr. Westlake: Putting it more crassly, that a person cannot bail out as a director simply because he senses the company is in financial difficulty, and avoid his responsibilities by so doing.

Mr. Elston: I am wondering just how--sort of looking at the other side of it--if I was a director, and I retired this year, and two years later, after my expertise was lost on the board, I found that all of a sudden the company had gone the other way, maybe I would not find it all that fair.

Mr. Westlake: I would be described as one of the wolves that the church was referring to the other day if I started to argue that position, but I will tell you, as a director of some companies and potentially of others, it is a prospect that gives you real concern in taking on a directorship with any company. It is perhaps the most real liability that a director faces under any of this legislation. For reasons that are well beyond his control, it is a penalty to accepting a directorship. That is for sure.

Mr. Elston: In addition to the extension under section 129, do you see this type of provision as being a major consideration? I guess it would have to be; you have already basically said that. It is going to be a major consideration for anybody who is potentially a candidate.

Mr. Levin: Can I point out to you, though, that the

director is going to be liable only for debts that become due while he is a director.

Mr. Elston: No, that is not what was said here. What Mr. Westlake had said was that potentially the debt could become due up to a period of two years.

Mr. Levin: No. The point is, go to subsection 1, you see that the director is going to be liable only for all debts that become due while they are directors. The debts must come due while they are directors. Therefore, if I resigned today, and there are no debts due, the fact that tomorrow there is a debt due, I am free and clear, as a director.

Mr. Elston: Okay, so we are back to my original premise which is there will never ever be a two-year time lag then, because you have to work within that six-month period. The employee has to sue for his wages within six months.

Mr. Levin: No. Let us suppose that a debt is due today. I resign today. The debt is due today, but the employee sues within the six months.

Mr. Mitchell: Excuse me, would this not be a situation where if the debt became incurred today, and a director retired, but the decision or whatever resulted from that debt being owed was not made until later on within that two-year period--that is what we are talking about, are we not?

Mr. Elston: I just sort of thought that when we put the limitation in here that, in fact, the debt had to be due--once it becomes payable then the six months runs, and if a fellow has worked and is owed for work then within that time period that debt is due to him, I presume.

Mr. Levin: It is interesting to compare the section with the federal legislation because the federal legislation talks about the corporation is sued within six months, and a director is not liable under this section unless he is sued for a debt incurred within subsection 1 while he is a director, or within two years after he ceases to be a director. The change in the Ontario act is in the fact that the corporation and the directors are both being sued.

Mr. Chairman: Mr. Howard, do you have something that might assist here?

Mr. Howard: Mr. Elston, on the point that you raised, we have simply continued the existing provision on that particular point. This has been in this archaic section that Mr. Renwick criticized right along. It is continued in the revision. This revision was not prepared by me, or my staff, I deferred to the experts in the Ministry of Labour, Paul Hess and his legal people. They prepared this and it was polished by my friends in the bar committee.

Mr. Hebb: If I might make one observation with respect to

the section of the federal act ties the liability of the directors to--

10:30 a.m.

Mr. Hebb: I just wanted to make one observation with respect to listening to this discussion. The federal act ties the liability of the directors to the performance of services by the employees as opposed to when the obligation of a company to pay the employees arose. I am wondering if this phrase "that became due," which is in the new Ontario bill, and I guess derives from the old Ontario bill, is not confusing the situation.

Surely the thing we want to do from a policy point of view is to fix liability for employees' wages on those persons who are directors during the period of service of the employees, as opposed to those persons who were directors on the employees' pay days. Maybe it does not make much difference in the final analysis, but there is a little different thrust if you compare the Ontario approach and the existing federal approach. That may be responsible for some of the difficulty we are having in addressing this issue.

The federal approach says, in section 114, that, "Directors are liable to employees for all debts not exceeding six months' wages payable to each such employee for services performed for the corporation while they are such directors," as opposed to the Ontario approach that talks about debts which become due while they are directors.

Mr. Spensieri: On this same section, this may be an unduly technical point, but it seems to me that there is a potential for defeating employees' claims where you have a private corporation, a nonoffering corporation, I should say, and the director ceases to be a director because of the earlier section mentioned by Mr. Renwick, by reason of death.

The estate would be wound up, I presume, reasonably quickly within a one-year period, and this two-year permissive section would, in effect, become stultified or nullified by the fact that the director's estate, which in some cases, where it is a one-man corporation,--let us say you only have one shareholder who happens to be a director--that might be the only meaningful avenue of pursuing the employee's claim and you might find it barred by the fact that the claim has not been presented during the period of the administration of the estate.

It seems to me there should be some kind of overlap in those situations. I do not know whether this has been considered or whether it is even valid, but I just see it as a potential for defeating an employee's claim in that restrictive class of corporations, a so-called one-man outfit.

Mr. Elston: I have just one comment. I think there are some real difficulties with the section. I think it is designed to give an employee a much broader area to work in than he has up to this point, but I think, in effect, it really does cut him down to six months and it really is not quite clear in my mind that we are doing exactly what the policy was designed to do.

I am wondering if maybe we should not have some further input from the people who actually work in this section. I do not think it justifies our retaining that section in the act merely because somebody else, from another ministry, decided they would not do extra work on it to clarify the problem. It may be one of these situations where we--although I hate to extend our sittings on this particular matter. Certainly, I hope it can be worked out before it goes to committee of the whole House in any event, because I see some real problems with it.

Mr. Chairman: Are you suggesting we stand this down and try to get somebody here from the Ministry of Labour this morning?

Mr. Elston: I do not know whether that is possible or even practical. I am not even sure they have the answers to our questions.

Mr. Howard: The six months' wages with which you are concerned appears in the present and existing act and has right along. There is nothing novel in that.

Mr. Elston: There may be nothing novel in it, but that is because--

Mr. Howard: We are easy. If you want to stand it down for an hour or so while Mr. Wells and members of the bar can see what they can do with it, if it warrants something being done. Mr. Chairman, are you agreeable to that?

Mr. Renwick: There is that problem and I am glad that Mr. Spensieri and Mr. Elston raised it. The problem is that the six months has been taken out of item one and put up in the preamble to item (b). When I say item one, I mean item (i). It has been put up into the commencing three sentences and does not qualify item (i). Whereas, in the act the six months only appears in the one provision. In other words, the two-year period appears to me to be applicable if one is acting under the provision of clause (ii).

Mr. Mitchell: Mr. Chairman, may I suggest we stand it down for an hour? Perhaps there is some wording that can be arrived at that will satisfy all parties here. I would move that be accepted.

Mr. Spensieri: I have one further point. I am sorry to be taking the committee's time on this but it seems to me that the definition of "director" is not made sufficiently clear. I guess this may be by operation of law, but does directorate to your knowledge include the estate of a director as a necessary implication of the definition?

Mr. Mitchell: If I might at the same time, we stood down section 48. We now have the proposed amendment to section 48 if you wish to return to that. At least that stand-down will be hopefully resolved.

Mr. Chairman: Whose motion is this?

Mr. Mitchell: This will be ours, Mr. Chairman.

On section 48:

Mr. Chairman: Mr. Mitchell moves that section 48(2)(b)(ii) of the bill be amended by adding at the end thereof, "based on the examinations or inquiries required to be made under the trust indenture."

Mr. Mitchell: I cannot recall at whose request this was stood down.

Mr. Chairman: I think Mr. Renwick had particular concern in that.

Mr. Renwick: No, Mr. Chairman, it was not mine.

Mr. Chairman: Mr. Knight.

Mr. Hebb: We were asked to work out some wording overnight. We did that and discussed it this morning with the legislative counsel.

Mr. Mitchell: And this has been the resolution. Does it satisfy both parties then?

Mr. Knight: Yes, it does.

Mr. Chairman: Are there any other comments with regard to Mr. Mitchell's amending motion? Mr. Renwick.

Mr. Renwick: These words, in fact, come at the end of section 48(2), that is what we are saying, is it not?

Mr. Yurkow: No.

Mr. Mitchell: No, it is 48(2)(b)(ii) following the word, "practices."

Mr. Hebb: The point being, Mr. Renwick, if they apply only to the auditor's opinion of a report as opposed to the lawyer's opinion.

Mr. Renwick: Right.

Mr. Chairman: Are there any other comments with regard to this amending motion?

Motion agreed to.

Mr. Chairman: Are there any other comments with regard to section 48(2) as amended?

Section 48, as amended, agreed to.

Mr. Chairman: We have stood down section 130. Do you wish

to stand down the entire section 130? Mr. Renwick has an amendment to 130(6). Would you like to leave that--

10:40 a.m.

Mr. Mitchell: Leave section 130 and stand it down in total for the present time.

Mr. Chairman: Section 131, are there any comments between sections 131 and 139, inclusive?

On section 131:

Mr. Renwick: I have not prepared nor do I intend to submit an amendment to section 131(9). Section 131(9) is as a result of correspondence which I have had over a period of time with Mr. Howard and with the then Deputy Attorney General, Mr. Leal, in an attempt to cover the difficult situation which arose when a chief executive officer of a public company failed to disclose a contract between the company of which he was chief executive officer and a company which he controlled, which resulted in a substantial additional benefit to the chief executive officer in the performance of that contract.

The securities commission considered the matter. I discussed it at the time with Mr. James Baillie who was then chairman of the commission after the commission had made a brief statement saying they were not proposing to take any action with respect to the matter against the particular officer concerned. That appeared to be the end of it. I therefore raised the matter both in the estimates and then by way of correspondence and section 131(9) is designed to attempt to cover that kind of situation.

You will, however, see that it is limited by the term "material" with respect to the kinds of contracts where there is a failure to disclose and that, of course, I have no special knowledge of the particular contract. But in the interpretation which is made of the term "material," I am not certain whether or not the particular contract would or would not have been caught, even though it was quite clear in the net result that significant financial benefit accrued to the chief executive officer concerned. Needless to say, he did not remain chief executive officer for very long after that.

But I was concerned that there was no positive way by which the corporation could reclaim the money, the profit which was made, and this is an attempt to say that. I would have, myself, had I been drafting the matter, left out the word "material" and I would have provided a permissive application by a shareholder, but I would have provided a mandatory application by the corporation and, failing that mandatory application by the corporation, I would have provided for mandatory application by the commission in lieu of the corporation taking the action.

Because the whole object of this provision is simply to reclaim for the corporation the profit or gain that would be realized by a director or officer when he has broken the requirement of the law with respect to disclosure.

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As I say, I think the provision is defective in having the word "material" in this particular situation. I do not think a chief executive officer should be contracting, directly or indirectly, with the corporation without disclosure regardless of whether, in a technical sense, the contract could said to be material or not material. As I stated, I would have left the matter that the shareholder could permissively bring the action if he chose to do so, but that the corporation would have a statutory mandate to bring the action. If it failed to bring the action, then the commission would have the mandatory obligation to bring the action.

As usual, when one tries to remedy a failure or an abuse that has come to the surface, one always has questions as to whether the language is apt to do it. As I said, I have no personal knowledge of the exact nature of the particular contract that was entered into by the company controlled by the chief executive officer with the corporation of which he was chief executive officer and whether it would be caught as being a material contract or transaction or not. I just do not know. Sufficient to say it was not an adequate response, at least the law was not.

The commission did what, I think, was quite appropriate in raising the matter publicly. I am quite certain the commission had grave concern about raising the matter publicly, but I am glad it did. This clause is a result of that event and I am content for the present purposes to let it go on that ground. I would certainly appreciate it if Mr. Hebb or any of his colleagues would like to speak to it. They may well be aware of the particular situation that is addressed by this new subsection. I would appreciate any comment they would like to make.

Mr. Mitchell: Just one preliminary comment Mr. Howard made to me. It would be his opinion the result you are looking for would be resolved. Perhaps Mr. Howard would like to make a comment.

Mr. Howard: Of course, whether the contract is material or not or the transaction is material or not is always a question of fact. In the existing act too that term is used in one of the subsections although it does not appear before. I think the contract we are talking about must be a material contract in the existing act in the subsection.

Mr. Renwick: I think my response on that particular point is it appears to me to be irrelevant whether it was a material contract or transaction at all. If the particular officer or director made a profit by means of a contract in which he had not disclosed his interest, and that is why I question whether the question of materiality is significant in this at all, the corporation should be entitled to reclaim the profit that was secretly made. That is my point about that question of materiality.

Mr. Howard: I think Harry Bray stated in estimates that this was a unique and unusual situation. The likelihood of it happening again was very slim. The way we have drafted this subsection 9, Mr. Renwick, I would think would be a deterrent now to anyone in a managerial or sitting in--

Mr. Renwick: I certainly hope so.

Mr. Howard: Because now a corporation may, a shareholder may, the commission may. Faced with all those possibilities of somebody taking action if he tries anything, I don't think anybody would have the temerity to try on what was done before. But I was going to say, subject to the comments from the members of the bar and the committee advising me, I would be quite prepared to recommend to the minister that we drop the word "material" in subsection 9. But if in the view of the bar it's not going to affect it one way or the other, I suggest leaving it the way it is.

10:50 a.m.

Mr. Hebb: I take it, Mr. Renwick, you are not necessarily making the case to remove the materiality standard from the whole of the section? You are principally concerned about subsection 9.

Mr. Renwick: Just subsection 9.

Mr. Hebb: I think, from a technical point of view, it would be difficult to make a distinction between subsection 9 on the one hand and the other requirements of section 131 on the other hand. The materiality standard, as you know, is designed to remove any concern about minor sorts of situations involving relationships with the company. I think you really have to consider what the impact of removing that standard would be at the beginning of the section, where the director is required to make a judgement as to whether he has to disclose a particular relationship with a corporation, whether he should refrain from voting and so on.

I think you would have to hit us at that point and, although I know the actual situation you were concerned about involved a chief executive officer, I take it from your remarks that your concern is about all officers and all directors profiting in a situation where they did not disclose the interest.

Mr. Renwick: Yes. I didn't feel you could single out a particular office that was held and fix that responsibility. It had to apply to the directors or officers. I accept the position on that question. As I say, when I first was considering it as it appeared finally in the bill, I thought I would move an amendment to delete the word "material," but in the context of the whole of the section, I am prepared to accept the view that this at least would be of persuasive value in deterring someone from attempting to do it.

I think they would be running a great risk, if they made a secret profit that they had not disclosed, in ever going near a court on the proposition that it was not material if it was, in fact, a profit. So practically, I am prepared not to disrupt the flow of the whole section on that matter.

The remark that this is a unique situation and is not likely ever to occur again I suppose would be true of a large number of specific sections of the Criminal Code as well, but we are not here to speculate whether it would or wouldn't. If what I think was considered to be a serious abuse had no statutory result other than

a rap on the knuckles in a very diffident way by the securities commission, it was just not adequate. I am happy with the section. I am pleased the ministry considered it and put it in.

Mr. Chairman: Are there any other comments? Please note that in your schedule of comments of the various witnesses, both the Ariadne Group and the Board of Trade of Metropolitan Toronto had comments in the sections up to 139, 131 and so on. Are there any other comments with regard to sections 131 to 139 inclusive? Perhaps I should say to 136 inclusive, because we start insider liability at 137.

Mr. Hebb: If I could comment briefly about one board of trade position that I recall in reference to section 135(2), the board of trade asked why indemnification under section 135(2) should require the approval of the court. This, by the way, follows the Canada Business Corporations Act. In the view of our committee there is indeed a significant difference between the section 135(2) type of indemnification and other types of indemnification under section 135.

Section 135(2) involves a situation where the corporation has brought an action against a director. It may be that a shareholder has forced the corporation to bring the action, but it is an action brought by the corporation against a director. Then the section says that, after the corporation has sued the director successfully and has got a judgement against him, the corporation cannot turn around and indemnify him for his losses in that lawsuit without getting the approval of the court. I think, if you look at it in that light, you can see pretty clearly the policy of the legislation.

Mr. Renwick: Mr. Chairman, I only have two comments. I raised in section 133, and I am not going to move the amendment, but we had a long discussion about whether the word "person" in clause 133(1)(b) should read "director" because that would have raised the level of the standard of care, diligence and skill that a person holding an office as a director or as an officer would be required to exercise. It would, of course, have to be "director or officer," so that the clause would read "exercise the care, diligence and skill that a reasonably prudent director or officer would exercise in comparable circumstances."

I did want to draw to the attention of the committee that the standard is not all that high and that at some point it may well be necessary to reconsider that position. A trustee would never get away with that lower level of standard of care and, indeed, the statute provides clearly in the sections dealing with the trustee that the trustee must exercise the care, diligence and skill that a reasonably prudent trustee would exercise in comparable circumstances. I am content to let that go.

This is an oversight of mine, because I did not write out the amendment, but I would ask under section 135 that you accept from me a verbal amendment that section 135(4) not stand as part of the bill.

Mr. Mitchell: I think, Mr. Chairman, if I can first

comment on Mr. Renwick's comments with regard to section 133(1)(b) with a question to Mr. Hebb, or whomever, it would seem to me, since within section 133(1) we do refer to director and officer, in fact it would be more proper to use that same terminology in section 133(1)(b). It is a minor amendment. I am not sure whether it would create any problems.

Mr. Hebb: I think, Mr. Chairman, if I could speak to that, there may be some legal implications. There is a difference, at least there has been in my mind, between this situation and the other situation Mr. Renwick mentioned of the standard of care imposed on a trustee. As he pointed out, the standard of care imposed upon a trustee is that of a reasonably prudent trustee.

In my mind, "person" is preferable here, in that if we change it to "officer or director" in section 133(1)(b), we are implying the presence of a class of directors and officers. Maybe that point is not so strong about officers, but at least with reference to directors, I think there becomes an implication that it is a professional group, a class of people who are directors. Certainly, when you are looking at trustees, you say that a trustee is a person who has certain professional qualifications. So to say that the person has to live up to the standards of a reasonable and prudent trustee is fine.

I am nervous, and I have always been nervous about mandating that a person exercise care, diligence and skill of a reasonably prudent director in that it suggests that this is a class of directors and they go around from board to board.

11 a.m.

Mr. Mitchell: The point is well made.

Mr. Westlake: It is not a minor drafting point at all. This is a point which, when the 1971 act was brought in, received considerable discussion at that time. I would submit the correct result was obtained, namely, "a prudent person." When you apply it to the majority of Ontario corporations which are managed by nonprofessional directors, the Mom and Pop stores that we have heard about before, it is imposing a higher fiduciary standard than is warranted in the average case. If you look only to the high-profile business corporation then perhaps it is a different consideration.

Mr. Mitchell: I accept the comments, Mr. Chairman. It was just by way of a question.

Mr. Hebb: To develop a wee bit further I think this perhaps could help you. Mr. Renwick made reference to the words, "in comparable circumstance." If you leave the word "person" there I think it is clear that those standards may vary depending on whether you are the director of a corner grocery store or a large business conglomerate. I think that is desirable from a policy point of view.

Mr. Mitchell: Thank you, Mr. Hebb.

Mr. Renwick: Mr. Chairman, I raised it just to let you know that I had not forgotten over the years that lower standard of care has been accepted in the act. Quite likely, Mr. Hebb, Mr. Westlake and I may have, on some other occasion, an opportunity to pursue the topic. I wanted to emphasize that there is a very strong school of thought that believes the fiduciary aspect of the director's responsibilities is the major part of his responsibilities and to lessen that standard--

I did not mean to provoke a lengthy discussion, but I do appreciate the exchange we have had on the matter.

Mr. Chairman: We have on the floor Mr. Renwick's motion amending section 135(4). Shall we deal with the sections up until that? No. Since we have a motion on the floor I guess we had better deal with that and not jump back and carry other sections.

Is there any discussion on section 135(4), Mr. Renwick's amendment to delete section 135(4) from the bill?

Mr. Renwick: Mr. Chairman, we had a discussion about this the other day.

Mr. Chairman: The liability insurance--

Mr. Renwick: I think it would be simply repetitive to discuss it further. I think we had a lengthy discussion on Tuesday of this week.

Mr. Chairman: All those in favour of Mr. Renwick's amendment please raise their hand.

All those opposed to Mr. Renwick's motion, please raise their hand.

Motion negatived.

Mr. Chairman: Are there any other comments with regard to sections 131 to 136, inclusive?

Sections 131 to 136, inclusive, agreed to.

Sections 137 to 139, inclusive, agreed to.

On section 140:

Mr. Chairman: Mr. Mitchell moves that section 140(1)(a) of the bill be amended by striking out "and the latest known address" in the first and second lines.

Are there any comments to Mr. Mitchell's amendment?

Mr. Howard: If you read section 140(1), "A corporation shall prepare and maintain at its registered office, or at any other place in Ontario designated by the directors, a securities register in which it records the securities issued by it in registered form, showing with respect to each class or series of securities,

"(a) the names, alphabetically arranged, of persons who,

"(i) are or have been within six years registered as shareholders of the corporation, the address including the street and number, if any,"--

Mr. Chairman: It's already there. Is there any other discussion on Mr. Mitchell's amendment?

Motion agreed to.

Section 140, as amended, agreed to.

Sections 141 to 146, inclusive, agreed to.

On section 147:

Mr. Mitchell: Mr. Chairman, I would move that subclause 147(1)(a)(iii) of the bill be amended by striking out "or" before "sales" in the second line and inserting in lieu thereof "and."

I further move that subsection 147(2) of the said bill be struck out and the following substituted therefor:

"(2) A corporation other than an offering corporation, all the shareholders of which consent thereto in writing, may apply to the director for exemption from the requirements of this part regarding the appointment and duties of an auditor in respect of a financial year, by filing an application in prescribed form together with such documents as may be prescribed and after giving to the corporation and to such other persons whom he considers should be given the opportunity, an opportunity to be heard, the director may, subject to the regulations, and upon such terms and conditions as he may impose, exempt the corporation and any of its affiliates from the audit requirements of this part where, in his opinion to do so would not be prejudicial to the public interest."

And I further move that subsection 147(3) of the said bill be struck out and the following substituted therefor:

"(3) For the purposes of subclause (1)(a)(iii), the assets and sales or gross operating revenues of a corporation include the assets and sales or gross operating revenues of each of its affiliates resident in Canada for the purposes of the Income Tax Act (Canada)."

Mr. Chairman, you may recall that there were comments raised by the Institute of Chartered Accountants I believe it was. This is in response to their concerns.

Mr. Chairman: Any comments with regard to this amendment of Mr. Mitchell's? Mr. Knight, you are satisfied with this as it stands?

Mr. Knight: I am sorry, Mr. Chairman. No, I have no comment to make.

Mr. Westlake: I think it should be pointed out, Mr. Chairman, that the practical effect of the change is to invite regulations to be made in this regard and that it really bounces the problem as to what restrictions, if any, will be imposed to the regulation making power. I assume they will be exposed for public comment.

Mr. Mitchell: Regulations will be exposed undoubtedly. I think just a further comment. It is in there that other jurisdictions make prescribed forms and that is what Mr. Howard's intent is within this as well.

Motion agreed to.

Section 147, as amended, agreed to.

11:10 a.m.

On sections 148 to 158, inclusive:

Mr. Chairman: Mr. Renwick, I have just called for sections 148 to 158. We did carry 147. I am asking for 148 to 158, inclusive. Can we call for the remainder or the balance of the auditor's and financial statement section, part XI? Are there any comments on sections 148 to 158, inclusive?

Mr. Renwick: No. I have no further comment on that.

Sections 148 to 158, inclusive, agreed to.

On sections 159 to 165, inclusive:

Mr. Renwick: I just have a question. I would appreciate it if counsel of the ministry would tell us what are the changes in part XII. It strikes me that, from the present act, there is a significant change.

Mr. Wells: If I may reply briefly, in section 159 I have a note that "the commission may apply, ex parte or upon such notice that the court may require," for an order under this section. In subsection 2, there are various matters spelled out for the court to consider.

Mr. Renwick: No. I do not have a problem with the application to the court. It is the ex parte--

Mr. Wells: Okay. There are provisions and--

Mr. Renwick: There is the omission of the corporation of appointing an inspector by resolution. Is that true, or am I wrong? In the present one, section 178(1), states "A corporation may, by resolution passed at an annual meeting of shareholders or a general meeting of shareholders, called for that purpose, appoint an inspector to investigate its affairs and management." Is that continued in this bill, or has that been dropped?

Mr. Mitchell: It refers to an inspector on one--

Mr. Renwick: Yes. I see your point. In other words, voluntarily.

Mr. Mitchell: --to have an investigation, rather than going through the court exclusively.

Mr. Renwick: That is right. As far as I can tell, that has been dropped.

Interjection: Yes, it has.

Mr. Renwick: Could I ask Mr. Hebb or his colleagues if they would comment on that? I am talking about the dropping of that specific--it has been around a long time, that clause.

Mr. Hebb: If I could just speak to that, I think the assumption of our committee was that was not a useful sort of provision. We were concerned with the corporation that could benefit from an inspection. The chances are that the person who sees the problem is not in control of the corporation and would not be able to succeed in having a resolution passed at a meeting forcing the inspection.

What happens under the new bill is that person would be entitled to go to a court and make his case to a court and have the court make the order. I think our judgement was we were not losing anything by following the somewhat more comprehensive inspection investigation provisions of the Canada Business Corporations Act and omitting the provision for a corporation to appoint its own inspector.

As a practical matter, I would have thought the corporation, if it wished, could have management make whatever investigation seemed appropriate. Now I do not know whether either of my colleagues want to comment on that.

Mr. Westlake: If I could add to that, Mr. Renwick, section 159 refers to a security holder of a corporation going to court, security holder being broad enough to include holders of debentures, et cetera, whereas the provision you referred to in the present act really is appropriate only for shareholders.

I suppose if you were going to reinstate such a provision, you would have also to struggle with the question of whether debenture holders and the like had a forum in which voluntarily to call for an inspection. It is a fairly significant drafting problem that is opened up by--

Mr. Renwick: I would not worry about extending it. I was just concerned that what has been in the statute for a long time was being dropped. I think I accept the view that it is not a very adequate method. The problem of course is that section 159 obviously means the usual problem of the cost of doing it, cost of making the application and so on, but I am content that it is being dropped. I was anxious to have it confirmed it was being dropped so that we could at least exchange our views on it.

Mr. Chairman: Are there any other comments with regard to sections 159 to 165 inclusive?

Mr. Elston: I have a brief question in terms of section 163. I wonder if we could have explained just a little what is meant by the word "absolute" in the phrase "absolute privilege." If you are making a report or if a report is being made and an inspection is being conducted, how do you then use the information the inspector gathers if there is supposed to be an absolute privilege for doing it? For some reason, it seems to me once the information is gathered, then it cannot be dealt with somehow.

Mr. Coombs: I think the term "absolute privilege" that appears there is really speaking to a defamation issue rather than anything else.

Mr. Elston: It cannot be used outside the scope of the section then presumably.

Mr. Coombs: If there is something that would otherwise be libellous in that report, it is not going to be actionable.

Mr. Elston: How would it be libellous?

Mr. Coombs: It could say someone is a crook.

Mr. Elston: Okay.

Mr. Westlake: The term "absolute privilege" in the context is being used as a technical one to distinguish from qualified privilege and absolute privilege but, having said that, I am not an expert on the law of privilege. It does speak to the point that Mr. Coombs is making, however.

Mr. Chairman: Where is the word "absolute" coming from?

11:20 a.m.

Mr. Coombs: It really comes from the law of defamation where you can have either an absolute or a qualified privilege. I am not sure I am prepared to talk about the law of defamation extemporaneously either but, even if a report is made which makes a defamatory statement with some kind of legal malice in the mind of the person making it, the inspector, it ought to be protected.

That is the philosophy that is embodied here so that, even if he has that element of malice, he is not going to be exposed to action. The object is to make the position of the inspector so secure that he will not fear any possible repercussion from speaking his mind on the matter he has investigated.

Mr. Levin: The object also is to ensure that people in communicating with the inspector will not have any qualms about speaking their minds, so that the inspector will be able to get as complete a report as possible.

Mr. Elston: Would that not be the case in any event when

there is a private communication between an inspector, for instance, and someone he is speaking to--

Mr. Levin: But the inspector would then publish that when he releases his report and if the statement is that somebody said someone else is a crook--

Mr. Elston: If he chose to put that in his report, then he is not going to suffer from it.

Mr. Westlake: And reproduction of that report might itself cause a publication of a libel.

Mr. Spensieri: That would confer some sort of immunity on the defamation issue. Do you think it could be interpreted to broaden the immunity to other kinds of prosecutions? Because it seems to me that you are really opening up the door in instances of malicious or pernicious conduct by an investigator which causes material harm to the corporation or to the shareholders. How would you--

Mr. Coombs: I think you are balancing two separate kinds of interests here. On the one hand, you have an interest in ensuring that inspections are carried out without any fear at all on the part of the persons making them, and you want them to be able to gather all the information they can possibly gather that is relevant to their inquiry, again, without any fear on the part of the person who is giving the information.

On the other hand, you have the possibility of harm if somebody makes a defamatory statement in the course of all that. You just balance those two things off against each other and I presume the intent here is to show that the balance is being held to be in favour of the freedom from action of the inspector and his witnesses.

Mr. Spensieri: The real concern is that you are granting to an inspector or any other person that level of privilege which up to now, I think, has been reserved basically for members while they are in the House. It seems almost to have elevated to that point.

Mr. Coombs: And I think witnesses in court.

Mr. Spensieri: Yes, I mean outside of the court system. Is that an extension which is to be really favoured?

Mr. Coombs: That is the policy decision that is inherent here.

Mr. Mitchell: That, I believe as well, Mr. Spensieri, is part of the current Canada Business Corporations Act, the same wording, word for word. That is not necessarily saying that is the ultimate, but in this particular case I think--

Mr. MacQuarrie: I am upset with the wording as Mr. Spensieri is, that you could have an inspector come in there and make the most outrageous statements in a report.

Mr. Spensieri: Or any other person.

Mr. MacQuarrie: Yes, or clearly defamatory; I just wonder, people more learned in the law than I, but I would think a certain amount of privilege attaches to a report of an inspector anyway, unless it can be established that it is malicious or made in bad faith.

Mr. Levin: I would point out that the inspector is appointed by the court and is under the control of the court in performing his role as an inspector. I think that if someone were asked to be an inspector by a court, without this kind of protection from possible civil liability, a qualified inspector might be very reluctant to act.

Mr. MacQuarrie: But would there not be a certain amount of protection implicit in the court appointment? This is the question that I tend to pose and wonder whether in this section we are carrying coals to Newcastle to a certain extent.

Mr. Levin: There is also, I think, the problem that, if a witness is called before an inspector and is obliged to testify under oath, then, as if the witness were in a court, the witness would be obliged to answer questions fully and truly. Yet the witness would not have the protection that is available in court, namely, that the statements the witness makes are, in court, subject to an absolute privilege.

Mr. Chairman: Any other comments with regard to that section, or sections 159 to 165 generally? Do you wish to deal with section 163-- Let us do it this way: any comments with regard to sections 159 to 162, inclusive?

Sections 159 to 162, inclusive, agreed to.

On section 163:

Mr. Chairman: The one we are dealing with--the absolute privilege--are there any other comments with regard to section 163?

Mr. Renwick: What is the privilege we are talking about?

Mr. Westlake: The privilege is immunity from civil suit in a defamation action, I believe. I just note another comparable reference in section 149(7). It says, "Any written or oral statement or report made under this act by the auditor or former auditor of the corporation has qualified privilege"--qualified as distinct from absolute, but it still has privilege in that context and, to take Mr. MacQuarrie's comment, I think one trusts that auditors are not going to be scurrilous in their nature, but one does not want to constrain them carrying out the professional responsibilities and the inspector is subject to the court and should have freedom.

The interesting extension in section 163 is to any other person who makes a statement, presumably to the inspector, and which therefore gets incorporated in his report.

Mr. Howard: As you are well aware, these investigations, whether they are into trading in securities or corporate matters, the reputations of responsible individuals can be at stake, and they have to be protected. That, basically, is the reason for this.

Mr. Renwick: I have no problem with it. I have the problem with "absolute." The protection to a person outside, against statements, is the same as the point which Mr. Westlake has made that--and I am glad he raised it--it would be a qualified privilege exercised as a caution on a person as to what one says.

I am not a lawyer in the law of defamation, so I do not pretend to know it but, if all we are talking about is the law of defamation, an absolute privilege means that a considerable amount of hyperbole could be introduced into statements that people make and there would be no restraint.

If an auditor, as such, is not a special class of person, and if "qualified" is good enough for an auditor, I would think it should be good enough for an inspector or anybody else. There must be some caution on the person to protect the reputation of other people.

Mr. Coombs: I think the difference may well be that the auditor has a great deal of freedom in what he puts in his report. Persons who give evidence or information to an inspector may, in fact, be compelled to give that. I note, for example, that they can be ordered to produce documents or records to the inspector, which may be their own private documents, never intended for publication, and may contain what would otherwise be defamatory statements.

But they have to give those up. When they give them up, those documents are then published and, technically, a defamation would occur and it would become actionable if there were not a privilege. There may be a considerable amount of legal malice behind those documents that were never intended to be published and no action would ever have arisen.

Mr. Renwick: I appreciate the distinction. I understand it.

Mr. Chairman: Any other comments with regard to section 163?

Section 163 agreed to.

Mr. Chairman: Sections 164 and 165, are there any comments with regard to those? No one would want to disturb solicitor-client privilege.

Sections 164 and 165 agreed to.

On section 166:

Mr. Chairman: Are there any comments with regard to sections 166(1)(a) to (m) inclusive?

11:30 a.m.

Mr. Mitchell moves that clause 166(1)(n) of the bill be struck out and the following substituted therefor:

"(n) add, change or remove restrictions on the issue, transfer or ownership of shares of any class or series."

Mr. Mitchell: I think the operative change is the addition of ownership, if I am correct.

Mr. Chairman: Any comments? Mr. Hebb.

Mr. Hebb: Mr. Chairman, we are now back into some amendments that are connected with the NEP provisions. I am wondering if Mr. Coombs might speak briefly to them as we go along since he didn't do that in his initial remarks.

Mr. Coombs: This change is really intended just to provide the opportunity for a corporation to amend its articles to restrict ownership in accordance with the NEP. It makes it clear that not merely a public-offering corporation but also a private corporation can restrict not only issue or transfer of its shares but also ownership of the shares. I don't think it's a matter of terribly great moment in the context of the other amendments to the act for NEP purposes.

Mr. Chairman: Thank you. Are there any other comments with regard to Mr. Mitchell's amendment?

Motion agreed to.

Section 166, as amended, agreed to.

Mr. Chairman: Any comments on section 167?

Section 167 agreed to.

On section 168:

Mr. Mitchell: Mr. Chairman, perhaps I will move the motion and then you can call the whole thing as amended.

Mr. Chairman: Mr. Mitchell moves that clause 168(1)(h) be struck out and the following substituted therefor:

"(h) Add, remove or change restrictions on the transfer or ownership of the shares of such class or series."

Mr. Mitchell further moved that the said section 168 be amended by adding thereto the following subsections:

"(5) Subsection 1 does not apply in respect of a proposal to amend the articles to add a right or privilege for a holder to convert shares of a class or series into shares of another class or series that is subject to restrictions described in clause 42(2)(d) but is otherwise equal to the class or series first mentioned."

"(6) For the purpose of clause (1)(e) a new class of shares, the issue, transfer or ownership of which is to be restricted by an amendment to the articles for the purposes of clause 42(2)(d) that is otherwise equal to an existing class of shares shall be deemed not to be equal or superior to the existing class of shares."

Any comments on Mr. Mitchell's amendment?

Mr. Coombs: If you wish, Mr. Chairman, I might just add a note of explanation about those provisions, which is that the amendment to 168(1)(h) is the same sort of amendment as we saw in 166(1)(n). The new 168(5) permits the grant of a conversion right to existing free shares for the purposes of the buy-in and conversion and resale provision in section 29.

The new 168(6) permits the creation of a new class of restricted shares for NEP purposes when there are other existing classes of shares of the corporation, without giving rise to the separate vote provisions of section 168 and without giving rise to any dissent or appraisal rights as a result of that. All that is happening is that a new class of shares which is otherwise equal to the existing shares is being set up with this one restriction for NEP purposes added to it.

Mr. Spensieri: Is this section specifically restricted to the situation where the corporation goes out and attempts to get back certain shares for the purpose of putting constraints on them and those shares may be of a similar nature to shares that are already outstanding?

Mr. Coombs: Yes, that is 168(5). That is the one you are talking about.

Mr. Spensieri: How is that differentiated if 168(5) deals with that and 168(6) simply sets up the consequences?

Mr. Coombs: No, 168(6) is not connected with section 29 and the buy-in and conversion techniques. It is included for the purposes of providing that if you have an existing class of common shares outstanding, for example, and you also wish to create a new class of shares for NEP purposes to be sold to Canadians, you can create that class of shares with the restriction on it without giving rise to any special dissent or appraisal rights or whatever to the existing class of shares.

Mr. Chairman: Shall Mr. Mitchell's amendment carry?

Motion agreed to.

Section 168, as amended, agreed to.

Sections 169 to 182, inclusive, agreed to.

On section 183:

Mr. Chairman: Mr. Mitchell moves that section 183(1)(a) of the bill be struck out and the following substituted therefor:

"(a) amend its articles under section 166 to add, remove or change restrictions on the issue, transfer or ownership of shares of a class or series of the shares of the corporation."

Mr. Mitchell further moves that section 183(27) be amended by striking out "deliver" in the second line and inserting in lieu thereof "sent."

Motion agreed to.

Section 183, as amended, agreed to.

Section 184 agreed to.

On section 185:

11:40 a.m.

Mr. Chairman: Mr. Mitchell moves that section 185(2)(g) of the bill be struck out and the following substituted therefor:

"(g) takeover bid means an offer made to security holders of an offering corporation to purchase directly or indirectly voting securities of the offeree corporation, where the voting securities that are the subject of the offer to purchase, the acceptance of the offer to sell or the combination thereof as the case may be, together with the securities currently owned by the offeror, its affiliates and associates will carry, in the aggregate, 10 per cent or more of the voting rights attached to the voting securities of the offeree corporation that would be outstanding on exercise of all currently exercisable rights of purchase, conversion or exchange relating to voting securities of the offeree corporation;

"(h) 'voting security' includes, (i) a security currently convertible into a voting security or into another security that is convertible into a voting security, (ii) a currently exercisable option or right to acquire a voting security or another security that is convertible into a voting security, or (iii) a security carrying an option or right referred to in subclause (ii)."

Mr. Elston: Is Mr. Mitchell going to explain all that?

Mr. Mitchell: I wouldn't have a hope.

Mr. Chairman: If you wish it further explained, Mr. Howard will do so.

Mr. Howard: I could refer Mr. Elston to the securities commission. At the end of November they published their proposed amendments to the Securities Act, and I am sure the members of the House received copies. In these proposed amendments they are extending a definition of voting security. For our purposes under our act we try to be as uniform as possible. With the Securities Act we have put in this new definition of voting security and we have amended the definition of takeover bid. With the present act it exceeds 20 per cent, and the commission wants to reduce that to 10 per cent.

In their explanatory note they expanded the definition of voting security and proposed a clause that takeover bids will include offers made to securities convertible into voting securities. The takeover bid threshold level has been changed from 20 per cent of the currently outstanding voting securities to 10 per cent of the voting rights attaching to the voting securities that would be outstanding on a fully diluted basis. We cannot provide one thing in the Ontario Business Corporations Act for Ontario corporations while the Securities Act provides something else which would apply to nonOntario corporations, including the securities of Ontario.

Mr. Chairman: Any other comments with regard to Mr. Mitchell's amendment to section 185? Shall Mr. Mitchell's amendment of section 185(2)(g) and (h) carry?

Motion agreed to.

Section 185, as amended, agreed to.

On section 186:

Mr. Chairman: Mr. Mitchell moves that subsection 186(1) of the bill be struck out and the following substituted therefor:

"If within 120 days after the date of a takeover bid or an issuer bid, the bid is accepted by the holders of not less than 90 per cent of the securities of any class of securities to which the bid relates, other than securities held at the date of the bid by or on behalf of the offeror, or an affiliate or associate of the offeror, the offeror is entitled, upon complying with this section, to acquire the securities held by dissenting offerees."

Mr. Mitchell further moves that subsection 186(2) be amended by striking out "by registered mail" in the second and third lines.

Mr. Howard: Mr. Chairman, basically this amendment to the bill introduced is housekeeping to consolidate what appeared as 186(1)(a) and (b) into one subsection. In substance there is no change whatsoever.

Mr. Chairman: Mr. Howard, would you explain the rationale as to why registered mail is removed?

Mr. Howard: Yes, to be consistent with other provisions of the section dealing with sending to the corporation or sending to the shareholders. There is no magic to registered mail today.

Motion agreed to.

Section 186, as amended, agreed to.

On section 187:

Mr. Chairman: Note that the board of trade has comments with regard to section 187. Any comments?

Mr. Howard: Just briefly, section 187 is a new departure.

It is novel in any jurisdiction in Canada and Ontario will be a first. It aims to protect the minority shareholder who might otherwise be locked in after a situation. It gives him a means of requiring the corporation to buy out his securities. This often happens in the case of these public offering companies that go to the public offering their shares to raise the capital and then enter into transactions in subsequent years, which result in the investor who invested with expectation of profit finding himself without a market in which to trade his securities. This gives him a means.

Section 187 agreed to.

On section 188:

Mr. Howard: This again is unique in any jurisdiction in Canada. Ontario is leading, as usual, Mr. Renwick. It is put in here at the request of the Ontario Securities Commission, which was faced with problems of what is known in the street as squeeze-outs as a result of going private. Again, it is a protection for the minority shareholder of the offering corporation.

Section 188 agreed to.

Mr. Mitchell: Mr. Chairman, after discussion with Mr. Renwick, Mr. Spensieri and others, the amendments to section 130 have been prepared. May we now go back to section 130, which was stood down? I believe the material is currently being circulated.

11:50 a.m.

On section 130:

Mr. Chairman: Mr. Mitchell moves that section 130(1) and (2) of the bill be struck out and the following be substituted therefor:

"(1) The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the Employment Standards Act, and the regulations thereunder, or under any collective agreement made by the corporation.

"(2) A director is liable under subsection 1 only if, (a) he is sued while he is a director or within six months after he ceases to be a director; and (b) the action against the director is commenced within six months after the debts became payable, and, (i) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part, or (ii) before or after the action is commenced the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the Bankruptcy Act (Canada), or a receiving order under the Bankruptcy Act (Canada) is made against it, and in any such case the claim for the debts is proved."

Mr. Mitchell further moves that section 130(3) be amended by striking out "clause 2(a)" in the first line and inserting in lieu thereof "clause 2(b)."

Any comments upon Mr. Mitchell's amendments of section 130(1), (2) and (3)?

Mr. Elston: This certainly makes it definite as to how long we have to institute an action against the director or former director. It has probably saved a large amount of money in terms of liability insurance premiums, which may have had to be extended for a full two years after the director ceased to operate. I am not sure that will have any effect on the rates that will be charged in any event, but at least we have cleared up now--certainly I think the profession, which was really what we had to do.

Motion agreed to

Mr. Chairman: Mr. Renwick moves that section 130 be amended by adding thereto subsection 130(6) as follows:

"(6) The employee has a preference for the debt under subsection 1 ranked in priority to the rights of creditors and shareholders."

Mr. Renwick: There may be those in the room who think I am trying to assist the employees by that amendment but, of course, it is designed to assist the directors of the company too. As you will see in section 130(4), the director, having paid the debt, is entitled to any preference that the employee would have been entitled to. I thought it made sense to provide the employees with a preference that would rank in priority to the rights of the creditors and shareholders.

I have introduced a bill in the House with respect to the Employment Standards Act to provide for a lien for moneys due under the Employment Standards Act to employees. I don't know whether that will ever pass, but I thought this was an appropriate place to protect the directors, and incidentally, of course, to protect the employees.

There is no magic to the particular language. I simply adapted it from some language that appears in section 36 of the bill, which we passed earlier this week. Section 36 provided that a claimant was entitled to be paid as soon as the corporation is lawfully able to do so or in a liquidation is to be ranked subordinate to the rights of creditors but in priority to the other shareholders. I thought it was appropriate in this case that the claim should rank in priority not only to the shareholders, but also to the creditors.

Perhaps those of us who are interested in the employees would support this amendment and those who are interested in the directors of the company would support it. I would assume that would probably cover all the members in the room, so I urge your support for the amendment.

Mr. MacQuarrie: Does that refer to all classes of creditors, preferred and otherwise?

Mr. Renwick: Everybody.

An hon. member: Even banks.

Mr. Chairman: And Revenue Canada?

Mr. Wells: I'm just wondering how that fits in with subsection 4 with respect to the preference the employee would have been entitled to on a dissolution on bankruptcy, et cetera. How is this new subsection going to interact with federal law dealing with bankruptcy and insolvency. Is this aimed only at the situation where the corporation is not subject to bankruptcy proceedings?

Mr. Renwick: Certainly it would have to give way to whatever the appropriate bankruptcy provision would be, but as is provided elsewhere, that would rise or fall on the law of the matter related to insolvency and bankruptcy. It would not, however, alter the fact that we could create, as we did in section 36, a preference or state a preference in situations that are not under federal jurisdiction, but which might very well be situations in which a company owed the money, and the moneys might well only be paid in a certain priority. Within our jurisdiction we are entitled to provide a ranking or a preference, without attempting at all to dictate what bankruptcy and insolvency law will or will not do.

I am hopeful, of course, as everybody else is, that the report that recently came down will go some way to solving the question of providing a higher protection for employees. I am particularly concerned about a company like Canadian Admiral and other such companies. I wanted to make certain, as far as we could here, we provided protection to the employees which, in turn, if a director had to be personally liable, would provide an additional protection to him as well.

Mr. MacQuarrie: I am directing this question to the members of the bar association. What order of priority do wages accrued and owing currently hold in terms of receivership or bankruptcy?

Mr. Westlake: I am not an expert in this area, Mr. MacQuarrie. I believe they have no special preference. I am not aware of any.

Mr. Levin: In a bankruptcy employees are given a preference--

Mr. Westlake: Where do they rank?

Mr. Levin: I believe, though I hope you won't hold me to this, that crown claims and claims of the trustee in bankruptcy and the professional advisers assisting the trustee rank in priority, that is, excluding secured creditors, and employees come in immediately after that.

Mr. MacQuarrie: The problem I have, Mr. Chairman, with

Mr. Renwick's amendment is whether in a case of bankruptcy we are in a position to lower, if you will, the rights of the crown plus the trustee in bankruptcy and the others already specified in the Bankruptcy Act and relegate them to a position lower than legitimate employee claims?

12 noon

Mr. Renwick: No, we can't. We cannot encroach on the legitimate field of operation of the bankruptcy and solvency law. But we can certainly set our own preferences with respect to matters dealing with voluntary liquidation in the province.

Mr. MacQuarrie: Receivership.

Mr. Renwick: Receivership and that kind of matter, and it seemed to me to be appropriate in this case, particularly when you take into account that we are speaking about a limitation of six months' wages.

Mr. Wells: I am not a labour lawyer at all and I just wonder how this would affect provincial labour standards legislation. I am thinking of the Employment Standards Act and any other acts that may in fact have priorities in them with respect to payment of wages.

Mr. Renwick: I am not a labour lawyer either; I am not really a lawyer any more either, but there is nothing I know of in the Employment Standards Act or in any other labour law in the province which establishes any preference or priority with respect to wages. That is my understanding of it, but I could be wrong. I think I am quite right with respect to the Employment Standards Act that when you have to give notice in layoff situations and so on there is nothing in that law which establishes any preference at all. Indeed, I think the Minister of Labour (Mr. Elgie) would say that is none of his business to establish preferences as to order of payment. I think that is a fair statement.

Mr. Hebb: I have been working out with my colleagues a few drafting refinements of the section. It may be premature to discuss it, I do not know. But if you like I would put them on the table. It is to bring the subsection in line with the other parts of the section.

First of all, I think we should pluralize the subject and make it "the employees of the corporation have." Then "debt" should be pluralized.

Mr. Renwick: Debts, yes.

Mr. Hebb: The word "rank" is superfluous. Delete that.

Mr. Renwick: Right.

Mr. Hebb: The next point is the employees are creditors, so I would think you should insert the word "other" in front of "creditors." So it reads, "In priority to the rights of other creditors."

Finally, I think the reference to shareholders is superfluous because of course all creditors as a matter of law rank ahead of shareholders. Delete the words "and shareholders." You end up with, "The employees of the corporation have a preference for the debts under subsection 1 in priority to the rights of other creditors."

Mr. Renwick: I would adopt the refinements of my counsel, Mr. Chairman.

Mr. MacQuarrie: Mr. Chairman, when we use the term "other creditors" I find it very difficult to comprehend how an employee in these circumstances, even though with wages owing and so on, might rank ahead of a secured creditor holding a valid security.

Mr. Renwick: Simply by statute.

Mr. MacQuarrie: We have a statute that establishes the validity of the security as well.

Mr. Levin: I would not have interpreted that language, Mr. Renwick, as giving an employee a preference over a secured creditor. Certainly when you look at similar language in the Bankruptcy Act, the employees, and indeed all other ordinary creditors, rank subsequent to secured creditors.

Interjection.

Mr. Levin: I think you could put that word in, but I think that would be how the language would be interpreted in any event.

Mr. MacQuarrie: The only thing is we do not have in either the interpretation section, the definition section, or any of the others, secured or unsecured creditors.

Mr. Levin: If you wanted, for the sake of certainty, to put in the word "unsecured" I do not think that would change the meaning, but it might clarify the issue.

Mr. Hebb: In bankruptcy legislation terms, I think it is clear that, first of all, you look after the secured creditors and then you look at all the other creditors, namely, the unsecured ones, and within that class you establish certain preferences. What we are talking about is the preference within the class of unsecured creditor.

Mr. MacQuarrie: That is what I would understand.

Mr. Renwick: I would accept even minor progress. If it is felt it should be "to the rights of other unsecured creditors," I would take a little bit rather than none.

Mr. Howard: Mr. Renwick, would you be agreeable to permitting us to have the opportunity to study and look at this further and, hopefully, before third reading come up with an answer for you, either by way of the amendment or a similar amendment, or an argument against it?

Mr. Renwick: That is what I was waiting for. I almost had a commitment and I was prepared to agree.

Mr. Howard: There are implications here with which we are not familiar just off the tops of our heads here without study and research. It may or it may not impact on existing bankruptcy legislation. We may put ourselves in the position of being ultra vires. I do not know. May we have an opportunity to come back?

Mr. Renwick: I would accept that. I am quite happy if the matter is given serious consideration. I do not pretend for a moment that one can come up with a solution to this question off the top of one's head. I am putting this case, and I am not putting the case solely because employees are different from trade creditors necessarily, but you do have a situation where companies get into difficulties which ultimately lead to the unfortunate consequences that would bring this section into play, and the employees will go on, and are likely because of their conflicting desire to continue to have a job and so on, be prepared to give some leeway to a company with respect to their wages over a period of time, though they may get upset and all the rest of it.

But it does seem to me that there is an equity which could be stated that they should have, for this six months of wage arrears and for their vacation with pay, a preference over and above other creditors. That is my view of it. I do not think it is an unreasonable position. If the ministry is prepared to give the serious consideration Mr. Howard has indicated they would give to it, then I am content to rest the matter at that point.

Mr. Mitchell: Mr. Renwick, I will, in fact, ensure that commitment is met. I must tell you quite honestly at this particular time, because of the varying opinions that we have expressed here both by the bar association and other members of this committee who work in this field all the time, I would be loath, speaking for myself, to be able to support the particular proposed amendment, but we will give that undertaking so that we will be able to answer you at the time.

Mr. Knight: Mr. Chairman, there is one other point which may be added to the list of considerations here. My colleague, Mr. LaFlair, raises the question as to whether this amendment would have some unintended implications for the situation where a sole or majority shareholder pays himself unduly high wages, or pays wages to his wife, and whether that could act to the detriment of other unsecured creditors. We do not have the answer, but I simply raise the question.

Mr. Gordon: Mr. Chairman, the particular motion and clause that Mr. Renwick has brought up is one that should be given most serious consideration, particularly because there is always change in this province and change in our attitudes towards how we handle things, whether it be layoffs, whether it be matters such as this one, and it is time there were changes made with regard to this particular point the honourable member has brought up. So I am going to be watching very closely as well to see what kind of an answer we come up with. I would like counsel to think about

arguments why we should be doing things like this, rather than arguments why we should not.

12:10 p.m.

Mr. Chairman: Thank you, Mr. Gordon. Mr. Renwick, I think you are withdrawing your motion, are you?

Mr. Renwick: Yes, standing it down on the understanding that the ministry has committed itself to a serious consideration of it. I will withdraw it in those circumstances. I will have an opportunity to reintroduce into the House in committee of the whole if occasion requires.

Section 130, as amended, agreed to.

Mr. Chairman: Starting part XV, liquidation and dissolution, section 189. I have no amendments or comments by any of the three groups making written representations down to 246. Does anyone have any comments with regard to any sections from 189 to 245, inclusive? That is taking off a big bite. The chair will not entertain "carried" quite yet. That is a lot of sections. Perhaps we should take to the end of part XV, sections 189 to 242 inclusive; that is the entire part XV, liquidation and dissolution. Shall sections 189 to 242 carry?

Sections 189 to 242, inclusive, agreed to.

Mr. Chairman: We are into part XVI, sections 243 to 245. Are there any comments? Shall sections 243 to 245 carry?

Sections 243 to 245, inclusive, agreed to.

On section 246:

Mr. Chairman: The Ariadne Group had a comment on that. Are there any further comments on section 246?

Mr. Elston: Mr. Chairman, at the time we were talking about 246 there was a question about the "and" that was in there, and I am wondering if we completely resolved whether that should have been "and" or "and/or." I think it was something we put back to be addressed at this time.

Mr. Howard: This was given a great deal of thought at the time it was being drafted and the "and" must stay. It is not an either/or situation. It is a listing of those who have the right to apply.

Mr. Yurkow: Mr. Chairman, if I may add, I do not think the "and" or the "or" makes any real difference in the interpretation or way that the provision would be interpreted, but I am satisfied that the "and" is correct.

Section 246 agreed to.

Sections 247 to 249, inclusive, agreed to.

On section 250:

Mr. Chairman: Mr. Mitchell moves that section 250(1) of the bill be amended by striking out "court" in the eleventh line and inserting in lieu thereof "divisional court."

He further moves that section 250(2) of the said bill be amended by striking out "and the practice and procedure upon and in relation to the appeals shall be the same as upon an appeal from a judgement of a judge of the Supreme Court in an action" in the third, fourth and fifth lines."

Motion agreed to.

Section 250, as amended, agreed to.

Sections 251 and 252 agreed to.

On section 253:

Mr. Chairman: Mr. Mitchell moves that section 253 of the bill be struck out and the following substituted therefor:

"253. An appeal lies to the divisional court from any order made by the court under this act"

Mr. Mitchell: This is following the previous change.

Motion agreed to.

Section 253, as amended, agreed to.

Sections 254 and 255 agreed to.

On section 256:

Mr. Chairman: Mr. Mitchell moves that clauses 256(1)(a) to (i) be renumbered as (b) to (j) respectively, and that section 256(1) be amended by adding thereto the following clause:

"(a) fails without reasonable cause to comply with subsection 29(5)."

It is pointed out this is with regard to the national energy policy. Mr. Coombs or Mr. Howard, any comment? Mr. Elston.

Mr. Elston: I am a little bit behind. I would like, after we have dealt with this section, if we could go back for a second to 254. I apologize for dragging behind a little.

Mr. Chairman: That is fine.

Do you want to take a quick look at 29(5), read this amendment with regard to NEP? Liberals or Mr. Renwick, any comments as to Mr. Mitchell's amendment?

Mr. Renwick: No, Mr. Chairman.

Motion agreed to.

Section 256, as amended, agreed to.

Mr. Chairman: Now, back to section 254, Mr. Elston.

Mr. Elston: I just wanted to note in passing that I was trying to put my thoughts together on section 254, and the subsection dealing with false statements encouraged by people and an offence committed under that section. I wanted to note that in the other section dealing with absolute privilege, we have probably gotten the individual out of any possible enforcement of this section by granting him absolute privilege in dealing with the inspector in the report that is made there. I wanted to bring that to the attention of the committee so that we know about that. At least what I feel seems to relate to that problem we were talking to earlier.

It might have been a better idea if we considered the idea of qualified privilege in order that the person might be dealt with under the provisions of this act if he misled the inspector in the investigation that was conducted. I think you might like to look at that along the way before it goes into third reading.

12:20 p.m.

Mr. Mitchell: We will look at that, yes.

On section 257:

Mr. Chairman: Mr. Mitchell moves that section 257(1) of the bill be amended by striking out subscript "(i)" in the second line and inserting in lieu thereof "(j)".

Motion agreed to.

Section 257, as amended, agreed to.

Sections 258 to 268, inclusive, agreed to.

On section 269:

Mr. Chairman: Mr. Mitchell moves that section 269 of the bill be struck out and the following be substituted therefor:

"269. Any person agrieved by a decision of the commission under this act may appeal the decision to the divisional court and subsections 9(2) to (6) of the Securities Act apply to the appeal."

Motion agreed to.

Section 269, as amended, agreed to.

On section 270:

Mr. Chairman: Mr. Mitchell moves that section 270 of the

bill be amended by adding thereto the following clauses:

"(v) prescribing acts of Canada or a province or ordinances of a territory for purposes of sections 29, 42, 44a and 55 and prescribing the notice required under section 44a(1);

"(w) authorizing a corporation to limit the number of shares of the corporation that may be owned by any person under section 42(3);

"(x) prescribing the manner in which funds may be invested under section 44a(5);

"(y) prescribing, (i) the disclosure required of any restrictions on the issue, transfer or ownership of shares of corporations in documents issued or published by such corporations, (ii) the duties and powers of the directors of corporations to refuse to issue or register transfers of shares in accordance with the articles, (iii) the limitations on voting rights of any shares held contrary to the articles; and (iv) the powers of the directors of corporations to require disclosure of beneficial ownership of shares and the rights of corporations and their directors, employees or agents to rely on such disclosure and the effects of such reliance,

"(z) prescribing the circumstances and conditions under which the director may exercise his power under subsection 147(2)."

Mr. Hebb: It might be useful Mr. Chairman, if Mr. Coombs were to speak to what it is anticipated will be prescribed under (y), a fairly comprehensive set of regulations which would be made pursuant to (y) now contained in the Canada Business Corporations Act.

Mr. Coombs: Mr. Chairman, there are presently in the Canada Business Corporations Act regulations quite a comprehensive set of provisions that govern constrained shares and constrained share corporations. Those regulations are really needed to provide a framework, if you will, for the policing by the ministry of what corporations do and may do in this area of constraining shares or restricting shares particularly for any (p) purposes in the case of Ontario. I suggest it is also desirable that the Ontario framework match up fairly closely with the federal framework for similar shares just in order to keep the brokerage community from getting too confused about the nature of the shares and shareholder rights.

In particular, I would draw your attention to things like the disclosure requirements. The whole body of legislation under the NEP will have a great deal of reporting required for the purposes of establishing for corporations and their shareholders and it would be preferable I think to match up those requirements with appropriate powers for these regulations. If there are any specific questions about any of the items, I would be happy to speak to them.

Section 270, as amended, agreed to.

Section 271 agreed to.

On section 272:

Mr. Chairman: Mr. Mitchell moves that section 272(4) of the bill be struck out and the following substituted therefor: "A decision of the director under subsection 1 may be appealed to the divisional court which may order the director to change his decision and make such further order as it thinks fit."

Motion agreed to.

Section 272, as amended, agreed to.

Section 273 agreed to.

On section 274:

Mr. Chairman: I would also point out the board of trade also had comments on section 274.

Mr. Mitchell: And Mr. Renwick. The amendment is being circulated, Mr. Chairman. It will just delay us a moment.

Mr. Chairman: I am sorry, Mr. Mitchell. You mentioned Mr. Renwick had--

Mr. Mitchell: I believe Mr. Renwick had raised some comments in this area as well.

Mr. Chairman: I see, but not an amendment?

12:30 p.m.

Clerk of the Committee: I think you have distributed a later one than this, the one you are getting now.

Mr. Chairman: Do you all have it?

Clerk of the Committee: That is the later one. That is the old one.

Mr. Chairman: Mr. Mitchell moves that section 274 of the bill be struck out and the following substituted therefor:

"(1) Any provision in articles, bylaws or any special resolution of a corporation that was valid immediately before this act comes into force and that is not in conformity with this act continues to be valid and in effect for a period of one year after the date of the coming into force of this section, but any amendment to such provision shall be made in accordance with this act."

I do not know whether it is appropriate at this time to comment, but by the time there is passage in effect, that time will really, I suppose, be somewhat handy to two years.

"(2) Any provision to which subsection 1 applies that has not been amended in accordance with this act within the one-year period shall be deemed upon the expiry of such period to be amended to the

extent necessary to bring the terms of such provision into conformity with this act.

"(3) A corporation may, by articles of amendment, change the express terms of any provision in its articles to which subsection 1 applies to conform to the terms of the provision as deemed to be amended by subsection 2.

"(4) A corporation shall not restate its articles under section 171 unless the articles of the corporation are in conformity with this act and, where the articles have been deemed to be amended under subsection 2, the corporation has amended the express terms of the provisions in its articles in accordance with subsection 3.

"(5) A shareholder is not entitled to dissent under section 183 in respect of any amendment made for the purpose only of bringing the provisions of articles into conformity with this act."

Mr. Wells: The purpose of this amendment basically is to meet the concerns of the Board of Trade of Metropolitan Toronto and Mr. Renwick. What we are doing here is providing a one-year grace period wherein corporations may voluntarily amend their articles to conform with the provisions of the act and, if they fail to do so after one year, the provisions of the articles, bylaws or special resolution, et cetera, are deemed to be amended. So, hopefully, it is the best of both worlds. The public offering corporations will have at least a year to get their house in order. I hope that this is an improvement and meets the concerns of both the board of trade and Mr. Renwick.

Mr. Spensieri: The amendments still do not seem to address the general point that, if we are really to be in conformity with the federal statute, some positive or fresh step should have to be taken by a corporation to continue itself later on.

I just wonder whether that point is going to be dealt with, because it seems to me that a year or so after the statute comes into force, it might be advisable to ask corporations to perhaps take a fresh step for continuance so as to eliminate a lot of the corporations which may now be dormant and are not active in any way.

Mr. Wells: In our experience, especially having watched the federal experience, that would be disastrous. We have close to 300,000 corporations in this province and to require each and every one of those corporations to file some kind of articles of continuance under the new act would impose an incredible burden on those corporations and on us.

We have fewer than 100 people in the companies division. The files would be stacked to the roof. I do not see that it is a good idea at all to require that corporations, in effect, be required to file some kind of articles of continuation or continuance, or whatever.

When the existing act came into force in 1971, the corporations were automatically continued under the act. We are

following the same procedure and it has worked well. That is my response to you.

Mr. Mitchell: Mr. Wells, perhaps we might point out, I think there is a case in point in Alberta, is there not, with their legislation?

Mr. Wells: No, I believe Alberta is going to require continuance although it was recommended that not be the case. However, they bit the bullet on it and said continuance will be required.

Mr. Spensieri: The whole objective is out of the 300,000 they might find that if they take a fresh and positive step, they might find that perhaps only 100,000 or 120,000 would be active companies. They would really be able to do a little housecleaning.

Mr. Wells: Then this committee might well be faced five years down the road with a slew of private bills to revive those corporations. This committee is well aware of the problems of the private bills reviving corporations which take up a lot of time. Hopefully, you can understand my point.

Mr. Spensieri: I appreciate it.

Mr. Hebb: Let me preface this by apologizing to Mr. Wells because some of us have been working with him this morning to polish this thing. I just have a suggestion to Mr. Wells to do a further polishing change. Would it not be helpful if subsection 3 were prefaced by the following phrase, "After the expiry of the one-year period," or something of that nature?

Mr. Mitchell: Would you repeat that again, Mr. Hebb, please?

Mr. Hebb: The question was whether it would be helpful to add a phrase at the beginning of subsection 3 to make it clear that it only comes into operation after the end of the one-year period because the deeming provision referred to in subsection 3 operates only at the end of year one, period, to help people work their way through the section.

Mr. Mitchell: Are you saying that, "After the one-year period a corporation may"?

Mr. Hebb: Yes. My suggestion for the wording was to say, "After the expiry of the one-year period a corporation may."

Mr. Wells: I believe the assistance of legislative counsel would be helpful. I believe the way it is worded is acceptable to me. I appreciate Mr. Yurkow's input.

Mr. Yurkow: I do not think the addition adds anything in that you speak in subsection 3 about the provision as deemed. It is not deemed until the expiration of the year. I think those words are redundant.

Mr. Elston: I just have one item. As I understood it,

part of Mr. Renwick's concern when he spoke on section 274 was that when we amend, by operation of law without there being a positive statement of what the content of the amended article would be, would there be some sort of a void which will arise later on if there is ever a question of some sort or another about the articles and capacity of a corporation to do something.

I am wondering if there is going to be something fashioned somewhere that would give substance to the actual reading of an amended article. I was wondering in terms of a regulation, or whatever, somehow to deal with the void which Mr. Renwick raised earlier, just as a matter of looking at the practical application of the operation of the law.

Mr. Wells: Perhaps I can think of the most common form of corporation which has been incorporated under the Business Corporations Act. That is the so-called \$40,000 corporation with 4,000 common shares without par value not to be issued for more than \$4,000, and 3,600 preference shares with a par value of \$10 containing certain rights.

Normally, those rights would include, perhaps, the right to vote or not. They might well carry the right to a dividend, say, of eight per cent on the amount paid up on the shares. It seems to me it is easy to read a provision in the coverage share conditions as if it was a no-par share.

I think you could say that a share with a par value of \$10 is entitled to an eight per cent dividend on the par value, that you can say, "Well, it is an 80 cent dividend."

12:40 p.m.

Mr. Elston: The short answer is no, as to whether or not there is going to be any drafting.

Mr. Wells: The answer is no, right. After all, a year is given for people to get themselves on side explicitly if they wish to, so we are going halfway at least.

Mr. Elston: Half the federal way and half the--

Mr. Wells: I can assure you the federal way just did not work.

Mr. Chairman: Are there any comments with regard to Mr. Mitchell's amendment to section 274? Shall the amendment carry?

Motion agreed to.

Section 274, as amended, agreed to.

On section 275:

Mr. Renwick: This is a matter of concern to me. Under the present act in section 253 the minister may delegate in writing any of his powers or duties under this act to any public servant in the ministry. We are now being asked to simply provide that the

minister may appoint a director to carry out the duties and exercise the powers of the director under this act.

I don't think the matter would be of such concern to me had we not been faced with the securities commission taking the position, which I do not know if they have receded from, that it is not responsible through the minister to the Legislative Assembly of Ontario. It took that position during the Re-Mor hearings. The reason for that is because of the wording of the Ontario Securities Act. While the minister under the Securities Act has been given the administration, there is a provision that says the commission has a certain responsibility. We were surprised when the chairman of the commission took the position that it was separate and distinct from the traditional views of parliamentary responsibility, because I had assumed it was responsible to the minister and that the minister in turn was responsible to the assembly.

It is for that reason I want to make absolutely certain that section 275 does not inadvertently remove the ministerial responsibility. I want to quote, if I may, from Halsbury's Laws of England, fourth edition, Volume 8, at page 596, part of paragraph 921 headed Ministerial Responsibility: "By convention the sovereign acts only upon the advice of her constitutional advisers and through the recognized executive departments and officers. Under the doctrine of ministerial responsibility some minister is responsible to the House of Commons for everything done in her name."

Then further on in Halsbury, in the same edition and volume, in paragraph 1128, Ministerial Responsibility: "In addition to their legal liability for wrongful or criminal acts and to their responsibility to the crown for the conduct of the executive, the members of the ministry are jointly and severally responsible to Parliament for every legislative and executive act of the crown and for every legislative measure introduced in Parliament with the authority of the government. For the crown has no power to do any public act, either in its legislative or executive capacity, except through the medium of some minister who is held responsible." There is a further part of that section I need not quote.

Then I would like to quote from deSmith, second edition, Constitutional and Administrative Law, at page 173: "Ministers are politically answerable in respect of matters lying within their statutory or conventional fields of responsibility. They are responsible not only for their personal acts, but for the conduct of their departments. The area of statutory responsibility is determined by the legislation establishing their offices and particular acts in subordinate legislative instruments endowing them with powers and duties. If a minister has no power or duty to take any action with regard to a matter, he cannot properly be held accountable to Parliament for what is done or left undone."

My point is simply that there is no delegation in this clause to the director. It appears to be simply a power to appoint and once appointed, the director is clothed with the powers and duties established in the bill we have just been dealing with. It seems to me it would be open to the minister to say: "Well, I am not answerable for what the director is doing. I have discharged my

obligation simply by appointing the director. It is the director who has whatever obligations he must carry out to carry out and exercise the duties and powers of the directors."

I may be straining in saying that in some way or other this would give the director a status independent of and to a degree removed from the minister and the responsibility ultimately of the minister to the assembly. But I was equally surprised when the commission in my view strained to take the position that it was not answerable to the minister, that it had some independent status and therefore the minister was not in turn responsible to the assembly for the Ontario Securities Commission. I would hate to think a minister of the crown would take the position that he was not responsible to the assembly for the administration of the whole of the act, including the duties and powers of the director.

I would, therefore, be much happier if that clause also contained a delegation to the director of his minister's duties. That was the format of the existing act, and that is why I quoted the provision. It is the minister who has the responsibility to carry out the duties and exercise the powers. He then may delegate in writing any of his duties. I am not moving an amendment to this particular time, because we passed this last session a bill amending the Ministry of Consumer and Commercial Relations Act. That bill may have filled the void I am speaking about in this situation. I have no concern about Mr. Howard not thinking that he is responsible through the minister to the assembly. I cannot speak for his successors. I would not want any committee of this assembly faced again with the, if I could use the term, "nonsense" put forward by the chairman of the securities commission on this vexed question at the time of the Re-Mor hearings.

Mr. Mitchell: Mr. Chairman, I do not know whether it is appropriate or whether I need comment, other than to say we have just recently dealt with a bill in the Legislature regarding ministerial delegation of authority, and I think the word "specific" was used in that.

Mr. Renwick: I am simply going to ask you to look at that question in the light of the comments that were made. As I said, I do not there is think anything particularly--I would have assumed there was no problem with it, just as I assumed there was no problem with the securities commission until we had that position taken by the chairman about the Ontario Securities Commission having some status independent of the responsibility to the minister and in turn to the assembly.

Mr. Howard: Mr. Renwick, in the interpretation part of the bill, it is quite clear the minister is the minister to whom the administration of the act is assigned. The director appointed by the minister is simply an employee of the minister responsible to the deputy minister and the minister and nobody else.

Mr. Renwick: It is exactly the same in the Securities Act. The Securities Act names the minister who is responsible for the administration of the act. The securities commission happens to appoint not by the minister but by the lieutenant governor in council, but apart from that--

Mr. Howard: But there is a difference. The director here is simply an employee of the minister responsible to the deputy minister and the minister and nobody else. The director would never be heard to argue that he was responsible to the Legislature and not to the minister.

Mr. Renwick: I am delighted to hear you say that.

Mr. Howard: Even my successors, whoever they may be--

Mr. Renwick: May I ask one other question? Not on section 275.

Section 275 agreed to.

Section 276 agreed to.

On section 277:

Mr. Renwick: On section 277, what is the intention of the ministry with respect to the coming into force by proclamation of the act? Are you thinking of a year from now or six months from now?

12:50 p.m

Mr. Howard: As circumstances develop with the NEP, and depending on what Mr. Knowles and I decide and recommend to the minister, we can, I am advised by legislative counsel, proclaim it piecemeal. Some of these parts have some urgency, so we may be proclaiming piecemeal. Of course, that would be subject to the preparation of the adequate regulations.

Mr. Renwick: I can understand that. Apart from the national energy policy, what is your intention with respect to the act? Are you talking of a year from now or six months from now?

Mr. Howard: We had indicated, Mr. Renwick, a year's lead time to prepare and expose regulations so that, theoretically and hopefully, the regulations and the act could be proclaimed in force at the same time. That would be the ideal situation. What I am saying now is we may have to proclaim in force parts of the act.

Mr. Renwick: I understand, but regardless of what action you may have to take immediately or in the near future, do you expect this act to be proclaimed on January 1, 1983? Is that your intention?

Mr. Howard: Hopefully, but I have had many hopes and expectations before.

Mr. Renwick: May I ask one further question? I thought it was a useful initiative by the Ontario Securities Commission to hold public hearings on the draft regulations under the Securities Act. I do not know how valuable they turned out to be, but I thought the initiative was useful. Will you be intending to hold public hearings on the draft regulations?

Mr. Howard: On that, Mr. Renwick, I would have to consult

my deputy minister and minister.

Mr. Renwick: I wish you would consider doing that and not leave the regulations simply as a matter of exposure to the inner group of those whom you consult about them. It may or may not produce anything, but on the other hand, a public forum for a discussion by anybody interested of the voluminous regulations which will appear under this seems to me to be a valuable initiative, which the commission itself had taken under the Securities Act.

Mr. Mitchell: If I may answer you, Mr. Renwick, that is a commitment Mr. Howard is in no position to give, nor frankly am I. However, having said that, I think we have indicated that in the preparation of the regulations, those people who have particularly expressed concern and interest and so on will most definitely be brought in. As to whether there will be public hearings on the regulations--

Mr. Renwick: I assume that you and your associates in the business community will consult, as you did with this bill. That is not my point. My point was, will you adopt the useful initiative, as I thought, of the commission of giving public notice of a forum within which those regulations will be considered even if it be behind closed doors?

Mr. Mitchell: That question can be raised with the minister. Certainly neither I nor Mr. Howard can answer that.

Section 277 agreed to.

Section 278 agreed to.

Bill 6, as amended, reported.

Mr. Mitchell: Mr. Chairman, just before we close, I personally would like to thank the members of the committee and the members of the bar and other associations, whose names, unfortunately, I cannot remember, who took the time to participate here and, in all honesty, made my task quite a bit easier. It has been greatly appreciated. I would say to Mr. Renwick in particular that I hope he has recognized that we have not been inflexible, but rather we have tried to be flexible in all our dealings.

Mr. Hennessy: Mr. Chairman, may I say to Mr. Mitchell I think he did an excellent job for the first time?

Mr. Renwick: Mr. Chairman, may I just add my word of appreciation to Mr. Hebb and his colleagues, Mr. Coombs, Mr. Westlake and the others who spent their time with us--I think they would have spent some time with us regardless of the national energy program provisions--and to Mr. Knight and to the other members of the bar that have been with us from time to time.

I think it was a useful precedent and extremely helpful. I would hope that perhaps the ministry in the future would begin the involvement of the legislative committee of the assembly, the standing committee on administration of justice, at some earlier

stage so that we don't have this problem of the committee being faced with wording which is etched in stone because it has been dealt with by consultation.

I appreciate, sir, your courtesy to us and the assistance that the staff of the ministry has given and its co-operation.

Mr. Chairman: Thank you very much, Mr. Renwick, and the members of the bar and the institute.

We will sit again on Tuesday morning; we will not sit on Monday. I assume that the clerk will be able to rearrange the witnesses for Tuesday. We will sit on Tuesday at 10 o'clock on the Children's Law Reform Act. You gentlemen will all be back on behalf of the Canadian Bar Association on the Children's Law Reform Act, I know, because you obviously are similarly versed in that statute as well as in this field of the law.

The committee adjourned at 12:57 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BILL 125, AN ACT TO AMEND THE CHILDRENS LAW REFORM ACT, 1977

TUESDAY, JANUARY 12, 1982

Morning Sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Treleaven, R. L. (Oxford PC)
Andrewes, P. W. (Lincoln PC)
Breithaupt, J. R. (Kitchener L)
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Laughren, F. (Nickel Belt NDP)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Piché, R. L. (Cochrane North PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M (Yorkview L)

Substitutions:

Cunningham, E. G. (Wentworth North L) for Mr. Breithaupt
Hennessy, M (Fort William PC) for Mr. Andrewes

Clerk: Forsyth, S.

From the Ministry of the Attorney General:

Beecroft, D. A., Counsel, Policy Development Division
Shipley, A. Q., Counsel, Policy Development Division
Taylor, G., M.P.P., Parliamentary Assistant

Witnesses:

From Justice for Children:

Kennewell, J., Member
Dunbar, M., Vice-President, Board of Directors

From the Canadian Bar Association (Ontario Branch):

Baston, P. F., Counsel
Dickson, M. L., Chairman, Wills and Trust Section
Lockie, P. E., Chairman, Committee on Children's Law Reform

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Tuesday, January 12, 1982

The committee met at 10:13 a.m. in committee room No. 1

CHILDREN'S LAW REFORM AMENDMENT ACT

Consideration of Bill 125, An Act to amend the Children's Law Reform Act.

Mr. Chairman: Gentlemen, seeing a quorum in place, I call the meeting to order. We are dealing with Bill 125, An Act to amend the Children's Law Reform Act, 1977. This matter was referred to us by the House on December 18, 1981.

Taking the place of the Attorney General is Mr. Taylor, the parliamentary assistant. At least this week we shall not have the parliamentary assistant voting from the monkey's chair here.

Mr. Elston: Unless he substitutes.

Mr. Chairman: The first witnesses before us this morning are from Justice for Children, Mary Dunbar and John Kennewell. Would you come up please and take one of those microphones at the end? Are you each going to be spokespersons or is one of you?

Miss Dunbar: We both are going to be speaking. First of all, I am going to introduce us to you. My name, as indicated, is Mary Dunbar. I am a lawyer in Toronto and I practise in the area of family law. I am here today as a representative and member of the board of directors of the Canadian Foundation for Children and the Law, which is known as Justice for Children. With me is John Kennewell, counsel in the legal services unit of Justice for Children.

Justice for Children has submitted a written brief on the proposed Children's Law Reform Amendment Act, Bill 125. We would like to highlight some of our submissions for you today. Please feel free to ask us any questions you may have as we go on. Mr. Kennewell is going to commence our submission for you.

Mr. Chairman: Do you have a written submission?

Mr. Kennewell: We do. We understood that it would be distributed to the members of the committee.

Mr. Chairman: Do you have them?

Clerk of the Committee: Did you submit it?

Mr. Kennewell: I brought it to the clerk's office yesterday afternoon and was assured that copies would be made for all the members of the committee.

Mr. Chairman: Fine. Would you carry on, and we shall get

copies of that. Do you have more than one copy with you or one only?

Mr. Kennewell: I have one extra.

Mr. Chairman: There is one extra copy here. In case the clerk cannot locate the other quickly, perhaps this could be photocopied. Carry on.

Mr. Kennewell: We have broken down our brief into four major areas of concern. Those areas deal with the role of the child, the role of counsel for the child, guardianship and the concept of the emancipated minor; this refers to young people of the age of 16 and 17.

The introduction to our brief quotes the Honourable Mr. McMurtry, where he indicated, concerning Bill 140, that it has been "our task to give a statutory base to some of the most important developments to date in child custody cases, while leaving open the way for further developments in the future."

Justice for Children approaches the Children's Law Reform Amendment Act from the point of view that the child should be heard in custody and access matters and should have the opportunity to participate in the decision-making which affects him, the child. That is the approach upon which we examine this legislation.

If this legislation is to be the custody and access legislation in this province for the 1980s, we feel that it has seriously overlooked some recent developments in the law and does not really break new ground for the 1980s in terms of allowing children to be heard in custody and access matters and in allowing them to really participate in the very important decision-making which affects children.

The child has a primary interest in these proceedings, and the basic rule of natural justice is that if you have an interest you can be a party to a proceeding. Our reading of the bill does not indicate that a child is a party in these proceedings. Section 63(3)(d) indicates that the parties to the proceeding, amongst others, include "any...person whose presence as a party is necessary to determine the matters in issue." That section does not set out an exhaustive definition of who is a party in an application under this part of the Children's Law Reform Act, and it could be argued by Justice for Children that a child is any other person whose presence as a party is necessary to determine the matter in issue. However, there are numerous other sections of the bill that seem to draw a distinction between a party and the child or counsel for the child. For example, if you look at section 30 of this legislation--

Mr. Chairman: Excuse me, Mr. Kennewell. With respect to the section you are referring, do you have a copy of the draft bill with you?

Mr. Kennewell: Yes, I do.

Mr. Chairman: Does it have, three quarters of the way down the front page, "Reprinted as revised by Legislative Counsel

having reference to the Revised Statutes of Ontario, 1980"?

Mr. Kennewell: It does.

Mr. Chairman: All right. There have been several draft bills out.

Mr. Kennewell: I think I have the right one. The first section I was referring to was section 63(3)(d) on page 30 of the bill, where it says, "The parties...shall include," and then subparagraph (d), "any other person whose presence as a party is necessary."

We are saying we could argue under that section that a child could be accorded party status, but it is obviously not clear because many other sections of the bill seem to draw a distinction between a party and the child or the counsel for the child. In that regard, I would refer the committee to section 30 as one example. Section 30 is on page six of the bill.

Under section 30(5), with respect to attendance for assessment, that distinction is made. It says, "The court may require the parties, the child and any other person...." In subsection 10 it says, "Any of the parties, and counsel, if any, representing the child...." Similarly, in subsection 15 under "other expert evidence," it refers to "the parties or counsel representing the child." So throughout the legislation there is a distinction apparently made between parties and the child or counsel representing the child which could be interpreted by the courts as not according the child a party status.

As a party to a proceeding, the child would be entitled to many of the rights, procedural rights and substantive rights, that we wish to address ourselves to today. If the legislation made clear that the child is a party to these proceedings, many of our comments would not need to be made. A child, as a party, would have the right to notice; to participation in production of documents; to discovery; to any other pre-trial proceedings, such as mediation; to a full disclosure of all reports and assessments; and to appear at the hearing.

10:20 a.m.

The Child Welfare Act has not specifically indicated that the child is party to a child welfare proceeding. However, a child is frequently interjected as a party into child welfare proceedings because the provincial court rules indicate that a child receives notice and then other rights flow from the child receiving notice.

Mr. Spensieri: May I interject, Mr. Chairman?

Mr. Chairman: Yes, Mr. Spensieri.

Mr. Spensieri: Are you saying that the expression "child and counsel for the child" should be an and/or situation or an interchangeable situation? I don't understand whether you are arguing for the additional inclusion. It seems to me when you say counsel for the child you would also be saying a child without

counsel could be present, or is that not your interpretation?

Mr. Kennewell: What we are saying is that a distinction should not be drawn between parties and either the child or the child's counsel, that either one of them or both of them should be considered parties. The child should be a party and, if the child has counsel, then of course his counsel is a party to the proceeding.

What we have done in our brief is indicate that if the committee does not feel ready at this point to make a child a full party to the proceeding, then the committee should go through the bill clause by clause with a view to according the child the right to be heard and the right to participate in important decision-making that affects him. This is our alternative approach.

The first sections that could be examined are the sections that relate to the initiation of the application. The right to initiate the application is given to a parent or any other person. While one could argue again that a child is any other person, we think this needs to be made clear.

For instance, in section 64(1) of this legislation, it is indicated that a minor who is a spouse may make an application under this part without a next friend and may respond without a guardian ad litem. This would seem to presume that a minor who is not married needs a guardian ad litem or, in some cases, a next friend.

The position of Justice for Children is that this intervention is not needed and that it is a paternalistic concept, where an adult is still deciding what happens, how matters proceed and what is in the best interest of the child. That concept is not interjected into the proceedings under the Child Welfare Act, and under the Juvenile Delinquents Act a child has counsel who is his counsel and represents him and is not acting in the role of the guardian ad litem.

In terms of initiation of the application, again the Child Welfare Act has led the way in the field of allowing children the right to be heard and participate because a child over 12 years of age can in his own right initiate a review of his status under the Child Welfare Act. I have already indicated that under the Juvenile Delinquents Act, children routinely appear before the courts without the intervention of a guardian or next friend.

Some might ask, when would a child want to initiate an application under this legislation? This legislation extends the areas involved not only to custody and access but also to any aspect of the incidents of custody of the child. Those words are found in section 21.

We can envisage situations where a minor child may wish to apply to vary an existing custody or access order. This child may wish to initiate an application so that he could live with a third party or so he could secure an education different from that desired by the custodial parents, whether it be in a separate school or in the public school system, for example. Another child

might wish to initiate an application so he can engage in religious training contrary to the desires of the custodial parent.

Another child might wish to initiate an application so that he could maintain his residence in Ontario. There was a case in the United States where the custodial parents wished to return to an eastern European country, and the child initiated an application to secure the right to remain in the United States.

We feel that there are any number of incidents where a child would wish to initiate an application, and that right is not spelled out in the act because the child is not a party and because of the wording of the section regarding the initiation of the application.

The next area we refer to in our brief is that provision should be made for notice of the proceeding to be served on the child. Again, the Child Welfare Act provides that a child over 10 years of age is entitled to notice of child welfare proceedings unless the court is first satisfied that the effect of the hearing or any part thereof would be injurious to the emotional health of the child. Children under 10 are not entitled to a notice unless the court decides that the child is entitled to be present at the hearing.

So there are presumptions on each side of the age of 10, but there is a possibility of a child at any age having the right to be present and receive notice of the proceedings under the Child Welfare Act.

The submission of Justice for Children is that the child should have the right to have notice of a custody or access proceeding so that he knows what is happening and can act upon that if he wishes. The child may or may not elect to participate in the proceeding, but we feel that the traditional principles of natural justice require that since this is an issue that vitally concerns his interest, he have the option available to him.

The next section that we would ask you to look at is section 30. This relates to the ability of a court to order an assessment. We feel that section 30 should be amended to protect the rights of the child when he or she is ordered to attend for an assessment in the same manner as is provided by the Child Welfare Act.

As the legislation presently stands, the child can be ordered to be assessed without having any input into that decision by the court. The court can order an assessment without the child being given notice that such an application is going to be made before the court, without being present when that order is made and without having any input into whether an assessment should be made and what the parameters of that assessment are. We feel this is quite important.

The Child Welfare Act, for example, provides that a court can only order an assessment after the child has been found to be in need of protection and by that point there is a considerable amount of evidence before the court and the child may be represented by counsel.

10:30 a.m.

Also under the Child Welfare Act, copies of the assessment report are inadmissible in most other proceedings except with the consent of the person involved. This is another area of concern to us. We feel this legislation needs to protect the confidentiality of any assessment ordered by the court so that it is not used in other proceedings.

Our recommendation is that section 30 should be utilized with respect to a child only after the child has become involved in the proceedings--for example, after counsel for the child has been secured--that copies of the assessment report should be available to an older child and that the confidentiality of the report should be protected in this legislation. If that is not done, the child can be subjected to an assessment without adequate explanation, without an opportunity to respond and without regard to his or her right to privacy.

The next question that we feel should be examined from the point of view of the child is the section relating to the mediation proceedings. This is section 31 of Bill 125.

The experience in many other jurisdictions has indicated that counsel for the child is often a catalyst for settling the case and avoiding trial. The literature states that counsel for the child is most effective when counsel is secured at an early point in the proceedings, because an escalation is avoided and the child has an interest in an early settlement of a custody or access dispute. If the child is not a party, then counsel for the child should be able to request that the court appoint a mediator.

The sections on mediation: Section 31(3), for instance, imposes a duty on the mediator to confer with the party but, since the child is not a party, the mediator does not have to confer with the child. So you have a mediation process taking place that does not even have a mandate to determine what the child wants.

I have indicated that other jurisdictions have found that counsel for the child can play a very useful role in obtaining an early settlement of these matters. In our brief we have cited the experience of the family advocate system in British Columbia which indicates that somewhere between 50 and 75 per cent of the cases are settled due to the influence of counsel for the child because issues are narrowed and, because the child's counsel has a great influence and is known to have a great influence, it acts as a pressure to settle reasonably.

Also because lawyers regard the counsel for the child as some assistance to them and explain to their own client what is a reasonable outcome, it helps them in situations where it might otherwise be difficult to advise against their own client's instructions.

We have found that the New York experience is similar and that if lawyers are appointed as soon as an apparent dispute is evident, they have considerable leverage to secure an early

settlement.

With respect to the official guardian's report--this is section 32--our comments here are that the section should be amended to exclude the possibility that a child might have to pay the fees and disbursements for the investigation of the official guardian.

The legislation has been changed somewhat from Bill 140 in that the official guardian's report is no longer mandatory. However, the reference in section 32 to the Matrimonial Causes Act indicates that the applicant under this part would have to pay the fees and disbursements.

Again, our point is that if a child should be an applicant with respect to custody, access or any of the incidents of custody or access, there should be provision made for the child not to have to pay fees and disbursements of the official guardian if such a report is ordered by the court.

The next section we address ourselves to is the participation of a child at trial. We submit that there should be provisions for the child to be present at a hearing or any part of the hearing in the same manner as provided under the Child Welfare Act.

Bill 125 makes no clear provision as to whether the child may be present at the hearing. In fact, because of section 65(2), it may considerably narrow the child's right to be present at the hearing and to participate in the hearing.

Section 65(2) indicates that the court may interview the child, and it could be argued that that provision is exhaustive of the child's right to participate in the proceeding. That section is another one which throughout the bill acknowledges that the child might have legal counsel, because it indicates in section 65(4) that the child is entitled to be advised by and to have his counsel, if any, present during the interview.

If I might digress here a bit, I find it rather striking that in a number of places throughout the legislation it is envisaged that a child might have counsel, yet throughout the legislation, as I have indicated, there are no real protections or rights given to the child and his counsel to play an effective part in the custody and access dispute in terms of initiating the application, in terms of making representations about an assessment, about mediation and the other areas I have indicated. This is just another section that envisages that a child might very well have counsel.

Our objections to this section are that it may be taken as exhaustive of the child's right to participate. That is simply a judge's interview.

A judge's interview is a procedure that was being used for some period of time, we believe, as a stopgap measure because no alternative procedures were available to inform a judge as to the real views and preferences of the child. We believe that procedure has now been bypassed by more recent developments and that to enshrine the section in the act is really going back. We believe

this procedure should not be institutionalized as it is at present.

The reasons for this are that there are problems inherent in a single interview by a judge in chambers, whether the child has counsel present or not. This has been pointed out in an article that we have referred to in the brief, an article by Barbara Chisholm. She has indicated that a single interview may provide misleading information.

She also indicates that an interview by a judge in chambers may force the child to abandon his role as an independent and impartial arbitrator of the facts. He is really stepping down into the arena, and that is a role that often judges are reluctant to do. It makes them reluctant to actually have an interview with the child.

10:40 a.m.

In our view, Bill 125 should draw on more recent experience, and that is the experience of the Child Welfare Act. Section 33 of the Child Welfare Act provides that the courts shall, in every proceeding, make an order directing whether the child should be excluded from or present at the hearing or any part thereof; and it is presumed that a child over the age of 10 is entitled to be present at the hearing unless one of the parties satisfies the court that for the child to be present would be injurious to his emotional health. For children under 10 the onus operates in the reverse direction: the court must be satisfied that to have a child under 10 present, the proceeding would be understandable and not injurious to his emotional health.

Our viewpoint is that the child should be present at the hearing in order to know what is going on and to have his voice heard in the decision-making process. Those are the sections I want to cover. Mary Dunbar will continue.

Miss Dunbar: For the assistance of the committee, we now are on recommendation three, the statutory right to representation. It is on page 12 of the brief.

It is a precept of our law that everyone before the court is entitled to counsel. Children are no different from any other party, according to our law, especially when you consider that many of the children who are going to be involved in these disputes and who will be involved under this act are teenagers up to 19 years of age. Bill 125 refers to counsel for the child in passing but does not give explicit statutory recognition to this principle.

At present in Ontario, children in custody and access disputes sometimes obtain counsel by order of the court. This representation is provided almost always by the official guardian's office. The representation is provided under a case and under the Judicature Act. Unless the official guardian becomes involved, it is almost impossible for a child to be represented in these disputes. The official guardian's office must use their own permanent staff. It is impossible for them to provide representation to all children who need it.

Children--that is, persons under the age envisaged by the act and children who are within custody disputes--are generally not able, either through lack of knowledge or of economic means, to obtain counsel themselves. They either don't have the money or the knowledge to go out and find one. They even may not know that they may be entitled.

Why would children need counsel? You have already heard Mr. Kennewell give a number of reasons why counsel are good in these disputes, but why should counsel be appointed for children in custody and access?

First, it is the nature of custody and access disputes, where at least two parties are fighting over a child or fighting over seeing a child, that they frequently forget the child. Because of their own relationship it becomes a very acrimonious debate, and they find it difficult to think about the best interests of the child as being potentially different from their own interests or their own wishes.

A wife will say: "He was a bad husband to me, and he should not be able to see the children because he is a bad influence. I don't want them to think that men should behave that way." A man may say: "I don't want my wife to have custody because she has a boyfriend, and that is terrible for my children." They become very angry with each other and that is reflected in their applications before the court. They become so polarized they cannot adequately represent the child's position or needs to the court.

Second, children often need to feel that they have a voice in their own fate. It is very difficult for them to do that without representation. It is very seldom that children give evidence in custody disputes, and I must say I feel that is appropriate. But unless a custody assessment is held, in many cases it may be that no one has ever asked the child what his or her view is.

I have parents come to me and say, "No, I have not asked them who they want to live with," or "I haven't asked them if they want to see the other parent, because I don't want them to be in a position of choosing." That is perfectly appropriate, but often the children really have a view and have definite ideas that they mostly want to see the other parent.

Third, counsel gives the child the means to start proceedings on his own. There is no point in a child being a party if he doesn't have counsel to help him carry out that status. A child who is already the subject of a custody order with no access may want to have access at some subsequent date to the other parent, or to a grandparent, or to an aunt and uncle or to a sibling. Unless he has counsel, or access to counsel, it is impossible for him to start that kind of proceeding.

Fourth, a child with counsel can ask for specific orders by the court; for example, he can ask for an assessment. Frequently parents don't want to get into the assessments, because it means they have to go and have meetings with people who will talk to them about their marriage, when really all they are talking about is custody. They can't see them as the same dispute. They don't want

to go for an assessment if that means they are going to have to see the other spouse. They certainly don't want the children to have to go through an assessment, because it means they will have to talk about all those unpleasant things that happened to the family. A child with counsel can get an assessment on his own application or can present that to the court as a viable alternative.

There is already children's counsel in Ontario. The Child Welfare Act experience is that it works very well. Over and above the examples studied by Mr. Kennewell, I believe it would be the acknowledged experience of the courts, of the official guardian's office and of the counsel in Ontario that are involved with this program, that it is working very well. It is developing a group of lawyers with expertise in the child welfare area just as it would develop a group of lawyers with expertise in the custody and access area.

The experience is that the child's lawyer actually reduces friction between the parties and helps to reach a speedier conclusion by assisting in negotiations and pushing for reconciliation. At the present time the official guardian's office represents children in custody and access, and again the experience is the same. Generally, a child's view is more readily acceptable to all the parties if there is a lawyer there enunciating that view; for example, whether the child in fact wants access and how often he want to see his other parent.

Representation for children is consistent with the principles of natural justice and equity. What would be fairer than that the voice of the person most affected by the decision be heard by the court? It is also consistent with good child care practices and with children's needs to be heard in the proceeding that so much affects them.

Recommendation four of the brief talks about when and how counsel should be provided. Bill 125 does not provide the means for counsel to be provided for these children. It is important that a means be set up. Children, even teenagers, simply cannot find, retain and pay counsel on their own. At the present time, courts are appointing the official guardian's office, and the official guardian's office is looking after having a specific counsel appointed but that, generally, is in Toronto where the official guardian has permanent counsel. Outside of Toronto they must retain lawyers in the private community on an individual basis, on a case-by-case basis.

The Supreme Court of Ontario does most of the appointing. Custody is heard in three levels of court: provincial court, family division, county court and the Supreme Court of Ontario. It is our submission that it is necessary that Bill 125 be amended to provide for appointment by counsel for all the courts with jurisdiction over custody and access.

The Child Welfare Act, which refers only to the provincial court, family division, allows a judge to direct independent legal representation if he believes it is necessary under those circumstances. The means for the lawyers have been found within that system, and we would recommend that kind of direction be

included in this act and that the need for setting up a lawyer system be incorporated into the act.

10:50 a.m.

It has been proved under the child welfare experience that the earlier the lawyer for the child is involved, the better it is for the case and for the child.

If Bill 125 were amended to state a right to counsel, as recommendation three suggests, then a child could ask for counsel earlier, or someone involved with the family could ask that counsel be appointed earlier. It is the experience in child welfare that the children's aid societies are asking for representation for the child very early, before the proceeding even gets near the court, because they are finding it such a useful experience to have a lawyer involved.

Or the bill could be amended, as suggested in recommendation four, to allow an application to the court for appointment of a lawyer, if it cannot be arranged otherwise, even before an actual court application is commenced.

Recommendation five talks about the role of the counsel. This is a dispute that has been raging within the legal profession since the Child Welfare Act first took effect in 1978 and 1979. The Law Society of Upper Canada has recently considered the issue of what the role of counsel should be and, although they do not have the legislative authority to indicate what the role should be or to change any of the privileges written into our statutory and common law, they refuse to remove the privilege on communications between children and their counsel. I would submit that this, in fact, is approval by the law society of the existing system that a child is the same as any other client and their communications are privileged. Part of that dispute has been whether counsel for a child represents his wishes or best interests.

The role of counsel is very important. If a lawyer decides in advance what is in the best interests of his client, and represents those best interests no matter what the child wants, this both usurps the role of the judge in making the determination--which is properly the role of the judge, and not of the lawyer--and undermines the relationship between the lawyer and the child. It can be used as an excuse for breach of confidence between lawyer and client, and the lawyer is setting himself up as judge ahead of the trial.

There are a number of issues involved in what role the counsel will take, including the capacity of the child to instruct, but I repeat that we are talking in many cases of children who are perfectly capable of making decisions about themselves. In "children" we include teenagers who may well have been making serious decisions about their own lives for years.

In our submission, it is important for the Legislature to address this issue of the role of counsel. What we would ask is that the role be that of the traditional lawyer-client relationship. If a child is too young or lacks capacity to instruct

counsel, then he should be treated the same way as an adult without capacity; and instead of having counsel, he should have a guardian ad litem appointed for him, someone who clearly is not acting as counsel but as a guardian of the child and is representing his interests before the court, not representing his wishes, or acting as a lawyer.

In our brief we also have addressed the issue of guardianship. I understand that you are going to have a submission later from the Canadian Bar Association specifically on this issue. Our major concern about the issue of guardianship is set out in recommendation six.

"Guardian" is a term that is well used in our society. It may not be precisely or even correctly understood by the public, but some idea does exist as to what it means. Virtually every person with children who has made a will has differentiated between the trustee, who will look after the money and the property, and the guardian, who will look after the persons of the children.

Our concern is around that kind of understanding. If "guardianship," which is used in Bill 125, is used with that word "guardian" or "guardianship," it will require a massive re-education program for the public and even for the legal community. Guardianship in the bill is talking about property, not about the person of the child, which is custody. We would recommend that a new word entirely, or the word "trustee," be used instead of the word "guardian."

Second, if property is distinguished from custody, as is suggested, it would be necessary in many custody applications to ask for both and, therefore, financial reliability will be part of all custody hearings. It will be possible to have custody in one person and property in another. It is important, in our submission, that if that is the case, the statute spell out the conditions under which a trustee will be appointed as opposed to a custodian and how the trustee should operate.

In all other circumstances, the normal care and management of a child's property should be a normal incident of custody. That is, if a child has a savings account, the custodial parent should be able to look after the savings account, as he can at present. That should not be divided into a separate person who will look after the property of the child unless it is special circumstances.

Recommendation seven talks about the unmarried emancipated minor. Bill 125 recognizes in section 66 the right of a child over 16 to withdraw from parental control. No one would argue that children over 16 do not have the physical means to withdraw from parental control. Many parents are delighted when their children over 16 make that move. It is a physical fact, this does happen, but 16- and 17-year-olds are in a strange no-man's-land in our law. Bill 125 allows a change in status if these minors are married but not for other minors. We would suggest that marriage is no guarantee of maturity and should not give a different status to 16- and 17-year-olds than simply withdrawing from the parental control.

We would suggest that a concept of the emancipated minor be

included in the bill and that marriage not be the only way that a child can remove himself from his parents' control. So the bill would be amended and, instead of saying that a child who is married at 16 or 17 terminates automatically the rights to custody or access over that child, withdrawing from parental control would terminate that. Our submission goes through a number of sections in the act and recommends that the reference to marriage be omitted from that.

Finally, the brief talks about enforcement provisions for abduction of children. I understand you are going to have a submission specifically on that point from the parents of abducted children. I would merely point out that in our brief there are recommendations about specific amendments to the bill that would put more teeth in the provisions.

For example, the bill indicates in section 24(3) that past conduct is not relevant to the determination of custody or access. We would suggest that abduction of a child is relevant and that should be included in considerations of custody and access. Also, we would recommend that the means for finding these children and returning them to their parent be included in the bill in that a specific authority be provided to the Attorney General to assist parents in locating these children and getting them back.

We also would recommend that the penalty for abducting a child be increased. It stands at \$1,000 at present, and for a lot of people that is absolutely meaningless, particularly if you compare it to the legal costs that parents spend in fighting over custody of children. There have been recent reports in newspapers about one couple in particular whose legal bills are over \$30,000 each in removing children, I believe between England, Saskatchewan and Ontario. So \$1,000 is a meaningless fine when you are talking about abducting children.

Those are the highlights of our submission. We did it within the time period. If anybody has any questions, we will be happy to answer any of them.

Mr. Chairman: Mr. Taylor, do you have any comments with regard to these presentations?

11 a.m.

Mr. G. W. Taylor: I have no comments on their general presentations, Mr. Chairman. The group made presentations previously when this bill was before the committee in its previous form, with review from that point till now.

Naturally, as the committee is aware, there is a different philosophy and approach to the bill as presented and that which the witnesses this morning are making on behalf of their group, the major difference being primarily that the features of the Child Welfare Act compared to this particular act, in that in the Child Welfare Act, where counsel have been appointed or suggested to have been appointed, it is one where the state is implicitly intervening, as the usual situation in the family, whereas in the particular situation under this act, it is the two parents who are

disputing and it is not felt, except for some particular situations, that a counsel for a child is a necessary function.

There is also the difficulty that there is some uniformity desired between the different statutes of the various jurisdictions, and Ontario is a participant in that uniformity. This particular drafting of the bill, as is before you, adheres to that uniformity, whereas the suggestions by the group here this morning would be a contrary position to that uniformity that is trying to be achieved, where some jurisdictions--and if we followed the suggestions made, this jurisdiction--would be entirely out of step with some of the other jurisdictions.

For that, the Attorney General and his advisers felt the bill should go as it is and that the recommendations not be adhered to, as have been made. They have been studied, reviewed and have not been felt to follow what the Attorney General thinks is the route. However, I am subject to the views of the committee and questions of the committee as we go through clause by clause.

We have two advisers here, Mr. Allen Shipley and Mr. Doug Beecroft of the Attorney General's office, who have reviewed this legislation in all its forms as it has passed in previous hearings, sittings and sessions; so they might add some more specific comments to the recommendations made by the witnesses this morning.

Mr. Chairman: Thank you. Mr. Shipley?

Mr. Shipley: Unless there are some questions from the members, I will reserve my comments till we get to clause-by-clause.

Mr. Chairman: Fine. Mr. Beecroft?

Mr. Beecroft: I agree with that.

Mr. Spensieri: Mr. Kennewell, I noticed, particularly in your submissions with respect to the rights to initiate proceedings, and when you touched upon the question of the ability to instruct counsel, you made reference to the older child.

I would have thought that one way to approach this problem would have been to give some statutory recognition to the concept of an older child, or reasonable other wording, so as to create a class of child and that perhaps could best benefit from these new rights which you are proposing to confer, such as the right to counsel, the right to initiate proceedings and so on.

I am wondering if you stop shy of that because of your experience in distinguishing classes of children who would benefit, or whether you felt it is not a valid concept to differentiate and whether that is specifically available as to what classes of children would benefit from these new-found rights.

Mr. Kennewell: From my own experience, I think all classes of children have been found to benefit from the rights that we are talking about. It is a fact that under child welfare proceedings, children under 10 have had counsel appointed and counsel for children under 10 have been found to contribute

constructively to the process before the child welfare courts. So we have not made that distinction. It is true that in the Child Welfare Act there is a distinction drawn, in a number of sections, generally between the age of the child over 10 and under 10, and then certain presumptions are built into those sections.

Another section deals with children over and under 12, but from our point of view a child of any age can have a useful input into custody and access proceedings. Therefore, we have not recommended that that distinction be drawn specifically, but that in general the person appointed through the court, not necessarily by the court, can make a decision as to the ability of his client to instruct him and then inform the court whether he is able to take instructions from the child client.

If he is not able to take instructions, not because of the child's age or because of the stage of development of the child--some children 10 or 11 may not be at a developmental stage that they can instruct counsel--then he will inform the court of that situation, and the appointment may become an appointment as a guardian ad litem, where he would then act in the best interests of the child. Generally, the first attempt would be to act in the traditional client-solicitor relationship.

I wonder if I could make a few comments, because we have talked about the child welfare area and the Child Welfare Act as setting out some new ground-breaking rules in terms of representation for the child. From our point of view, the similarities are more important than the differences. Obviously, in the Child Welfare Act you are dealing with a situation where the state is intervening. Nevertheless, the issue under the Child Welfare Act is what is in the best interests of the child, and that is the same issue that is present before the court in a custody dispute.

It was thought that in Child Welfare Act matters the child has a view of what is in his best interest, and that is the same situation in a custody, access or incidence of custody dispute that is before the court. The child will often have his own view that he wants before the court, and should have a right to have it before the court, as to what is in his interest.

In custody and access situations, often the parents are presenting to the court what they believe to be in the best interests of the child, but in fact it is often being presented in terms of what is in their own best interests as parents or guardians, and not from the point of view of the child. I think that is the real issue. Whether it is the state that is intervening or whether it is a dispute between two parents, the issue is what is in the child's best interests, and the child may have his own view as to what is in his best interest.

In both situations, in a custody dispute or in a child welfare dispute, you are dealing with a major disruption in the child's life. Whether the child, under the Child Welfare Act, gets placed with a state agency, or, in fact, under the Child Welfare Act, the child can be placed with one or other of the parents, or even with a third party. In a custody dispute, the outcome can be

the same. The child can be placed with one or other of the parents, or even with a third party.

The fact is that it is a major disruption in the child's life, and the child has a very important interest that is being decided by the court; given that point of view, it is our position that the child needs an advocate. We see that as the important similarity between the Child Welfare Act and custody and access legislation, and that important similarity overrides the fact that under child welfare one of the interested parties is the state or the children's aid society acting on behalf of the state.

11:10 a.m.

Mr. Spensieri: Perhaps I did not make myself clear, but the thing is that this committee, in dealing with this bill, is only concerned with three specific items, as you pointed out: access, custody and property management. It seems to me that the crux of the matter, in conferring rights upon the child, is the ability of that child to make a meaningful assessment of what he wants.

That is why I would have been prepared, and I am sure my other colleague would have been prepared, to consider support of these rights in an area where you have defined an older child as perhaps someone from the magic age of 10 to the limbo age of 17 and restricted the conferring of these representational rights to that category. It's meaningless to confer them on children under 10 or something of that nature, because they couldn't conceivably be able to have input in any meaningful way.

It seems to me that you are asking for the creation of a vast area of rights for a group that couldn't possibly be expected to benefit from them. If you had said an older child shall be entitled to this and you had defined an older child as someone, let's say, over age 10 who is presumed to have the ability, then I could have perhaps seen a greater tendency to lend support to these new rights, limiting it to the three categories we are considering this morning. It's meaningless to confer representational and substantive rights on a person who is not going to have the ability to avail himself of them in any sense.

Miss Dunbar: That's why we attempted to distinguish between a guardian ad litem for a child who doesn't have the capacity to instruct and counsel for a child if he does understand what he is doing. But there is no way you can do it by age, unfortunately, because there is such a difference in children, depending on their experience and their own--

Mr. Spensieri: Age at least brings a presumption of some ability.

Miss Dunbar: The Child Welfare Act does distinguish between the ages of 10 and 12 and makes presumptions change--over 10, under 10; over 12, under 12--in certain areas. So they are saying that those two ages are times when children will probably be able to exercise those rights.

Mr. Kennewell: I would like to make one other comment, if I might add it. With regard to the Child Welfare Act and the uniformity of legislation, from our point of view this legislation does not conform to previous legislation in Ontario and is out of step with that legislation. I am not familiar with how it does or does not conform to custody legislation in other provinces, but I think this legislation is somewhat of a retrenchment of the legislation in Ontario that accords a child the right to participation in a proceeding when his future is being decided.

Mr. Renwick: Mr. Chairman, I would like to ask the parliamentary assistant just a couple of questions with respect to the submission that we have just heard.

Am I correct, Mr. Taylor, that what you refer to as the philosophy behind the bill is that a child may not make an application to a court under this part?

Mr. G. W. Taylor: That is correct, except that this group puts forward a considered thought that the bill implies that if you extended some of the wording this might be a possibility. But it's intended that the child not be a party in a dispute between husband and wife as to custody.

Mr. Renwick: So you are saying to me that it is not contemplated in this bill, regardless of what semantic arguments could be made about the wording of the bill, that a child is a party to a proceeding under this act in the sense that the term "party" is used?

Mr. G. W. Taylor: That's correct, Mr. Renwick.

Mr. Renwick: I take it, however, that the whole object of this part is to act in the best interests of the child, that the exclusive responsibility of the judge hearing the case is to act in the best interests of the child.

Mr. G. W. Taylor: That's correct, Mr. Renwick.

Mr. Renwick: And it's exclusive.

Mr. G. W. Taylor: It's exclusive, yes; and I think this has been a concomitant of the welfare of the child in both the Child Welfare Act, which has been referred to, and in this particular statute.

Mr. Renwick: I guess the next matter I am interested in is that your advisers would prefer to deal with any substantive questions as well as any procedural ones when we come to the clause-by-clause consideration of the bill. I presume that we will be able to discuss these larger questions under section 19(a), which talks about the purposes of the bill. These broader questions can be dealt with at that point.

Mr. G. W. Taylor: Yes, there is the possibility it can be done under that section or under the other sections, Mr. Renwick. I think the reluctance of the advisers this morning is that this is a topic that can be debated today, I guess, and will be debated in

future, at great length. It's a question of contrary philosophies. Representation of the child by independent legal counsel is a larger sphere than this particular statute contemplates at this time. I think one could discuss the philosophy that is contrary to the position of the legislation at length. That's why they were reluctant to discuss it this morning.

In addition, it has been reviewed previously--though not in this bill, as I noted--because it had been discussed previously when this group was before committee on another occasion when a similar bill was before the committee. So it has been reviewed by the Attorney General's staff and considered not to be an approach that the legislation is going to take at this time.

Mr. Renwick: I take it, therefore, that the position of the minister on whose behalf you are dealing with this bill is that the ministry will not contemplate an amendment or a series of amendments which would provide that a child be a party to the proceeding.

Mr. G. W. Taylor: At this particular time if any recommendations are made or suggested by the committee I would be willing to discuss them with the Attorney General. But I think there is great reluctance to make any global changes such as that of making a child a party to the action, as we discussed earlier when you asked if a child is a participant in or a party to this action. I think the answer to that is that any amendments at this time would be received only with great reluctance by the Ministry of the Attorney General.

Mr. Renwick: I do take it, knowing you and how open you are about most of these matters, that you would be prepared to consider a clarification and amendments directed towards making clear in the bill the role of the child and the representation question of the child.

11:20 a.m.

Mr. G. W. Taylor: I thank you for your comments about my generosity, Mr. Renwick. I naturally would discuss any of the amendments that are put forward thoroughly with the Attorney General. The advisers are here this morning; I am sure that some of the amendments you put forward might give clarity to the bill in its present form, and I am sure those would be considered.

But where the amendments would be a total departure--to give counsel to the child as a party with counsel would be departing, I believe, from the general philosophy and tone of the present legislation--those amendments would be received with a reluctance to follow them.

Mr. Renwick: I take it--and if you do not know offhand, perhaps your advisers would let me know--that in any proceeding in any court under this proposed act a judge can appoint counsel for a child.

Mr. G. W. Taylor: That's correct.

Mr. Renwick: I'm not talking about all the fine distinctions; I'm talking about counsel to represent the child in a position analogous to that of counsel for an adult party without the child being a party.

Mr. G. W. Taylor: I think, Mr. Renwick, that in discussion with Mr. Shipley--and we discussed this earlier before the legislation came before the committee--there is the possibility of judges appointing counsel to represent the child.

Mr. Renwick: I am not helped by that "possibility." I want to--

Mr. G. W. Taylor: It can be done, yes.

Mr. Renwick: Then there is no situation in which a judge cannot appoint counsel for a child in these applications even though the child is not a party to the proceeding.

Mr. Shipley: Perhaps I might try to clarify that. It may be stating it a little broadly to say that there is no situation in which the court cannot appoint counsel for the child if the court feels it's in the child's best interest. It does seem that the court can ensure that the child has counsel.

In the Supreme Court, where the Judicature Act applies--I think it is section 109, now that it has been revised--the courts have interpreted the power there to allow them to appoint the official guardian to represent the child in a custody case.

In the provincial court, family division, there are rules that speaks more broadly. I'm not just sure of the exact wording. It says in rule 36 in the provincial court, family division, rules: "Where a court is satisfied that the interests of a minor are involved in a proceeding, the court may give such directions for the representation of the minor as the court considers proper." That possibility exists as well.

So there are opportunities. I'm not so sure whether it's a right, but there are opportunities for children to have counsel in custody cases. In fact, those opportunities are--

Mr. Renwick: I wasn't speaking about a right; I was speaking about a judge deciding that a child should be represented in the court by counsel even though the child is not a party to the proceeding.

Would your advisers be good enough to give me and other members of the committee, if they wish to have it, a copy of each of the rules of court under which a judge can exercise a discretion, since the term "court" is defined as the provincial court, family division; the unified family court; a county or district court; the Supreme Court; or a surrogate court exercising jurisdiction under section 72? That encompasses all the courts of the province, as I understand it, that would have jurisdiction.

Mr. Shipley: Yes. There is some--

Mr. Renwick: Could we have a copy of each of the rules?

Mr. Shipley: Yes.

Mr. Renwick: And, if possible, an example of situations in which a judge has exercised the power contained in the rules to appoint a representative for a child in a situation where the child is not a party to the action?

Mr. Shipley: Certainly. I can say now that there is some doubt about the power of a county court, I believe, to actually appoint. There is no rule that specifically applies to the county court, but there are devices that the courts use, I believe, to ensure that the child is represented.

Mr. Renwick: I would not want to think that the judges are not acting in accordance with the law, but I would appreciate knowing of whatever devices the county court judges now use.

Mr. Shipley: I think they just adjourn the case and ask the parents or whoever to come back with counsel, and then they make the necessary approaches.

Mr. Renwick: (Inaudible). I would appreciate that information.

The second request I would have would be specifically, could you ask the official guardian, or whoever in the official guardian's office is not only knowledgeable about but also a specialist in this in the absence of the official guardian, to come and tell us what capacity that office has to deal with children as children and not children in relation to property or children as property?

Mr. G. W. Taylor: That is the practical capacity as compared to the legal capacity?

Mr. Renwick: Both.

Mr. G. W. Taylor: Both, okay.

Mr. Renwick: Both, because under the rules I think the judge can appoint the official guardian, and I do not think he is restricted to appointing the official guardian only in the traditional sense of property interests of the child. I am not sure about that.

Mr. G. W. Taylor: In that same question, Mr. Renwick, I assume you would want to know if the official guardian is appointed in his capacity as official guardian, say in a custody application, who other than the official person--does he assign a lawyer, does he assign a lawyer and support staff?

Mr. Renwick: Yes, and what capacity have those lawyers to deal in this field as distinct from the field that you and I traditionally know of as the field of the official guardian, which generally is not personal representation of children in their personal capacity with respect to their rights as citizens rather

than their rights with respect to property?

I guess my last request is to ask the witnesses before us from Justice for Children, the Canadian Foundation for Children and the Law, if it is conceivably possible that a representative can be with us the rest of today and tomorrow and Thursday, if necessary, while we deal with the bill on a clause-by-clause basis?

Mr. Kennewell: I could be available tomorrow.

Mr. Renwick: We will not be to the clause-by-clause parts of the bill until when--until tomorrow afternoon?

Mr. Chairman: Or very late tomorrow morning, depending on the Canadian Bar Association's presentation.

Mr. Renwick: And my request for the official guardian.

Mr. Chairman: Yes. So more likely it will be two o'clock tomorrow afternoon to commence the clause-by-clause.

Mr. Renwick: Can we let Mr. Kennewell know that we would not start before two o'clock tomorrow afternoon on the clause-by-clause, in case he has other things to do?

Mr. Kennewell: That is fine.

Mr. Chairman: We would not start earlier than that. Thank you very much.

Are there any other comments or questions of these witnesses?

Mr. Kennewell: I wonder if I can make one comment in the light of some of the discussion that has taken place since we concluded our comments. I want to perhaps stress the point that in our brief we have taken the position that if the committee does not feel it is prepared to actually make the child a party, there are other ways that we have suggested, other sections that can be looked at specifically, to have the child's voice heard.

When you look at the legislation, as I have indicated, there is reference to counsel for the child, but what the bill fails to do in its other sections, after envisaging counsel for the child, is it fails to indicate what exactly that child's lawyer can do. It fails to indicate what that child's lawyer can do in terms of court-ordered assessment, whether the child's lawyer has any role to play there.

Under the mediation section it says that the mediator has to talk to the parties, but if the child is not a party, then there is no provision that the mediator should talk to the counsel for the child or the child. So instead of giving a blanket right to be a party, those sections can be looked at from the point of view of providing that the mediator can talk to counsel for the child if there is one.

Mr. Chairman: Thank you for your presentation. We will see you again tomorrow.

11:30 a.m.

Mr. Chairman: The representatives from the Canadian Bar Association, wills and trust section, could you please come forward? I believe they are Messrs. Lockie and Baston and Ms. Dickson. For the committee, I believe it is Mr. Baston on the left or north and Mr. Lockie on the south.

Could you first distinguish between yourselves or your role and the Canadian Bar Association, family law section, which will appear tomorrow morning?

Mr. Lockie: Mr. Chairman, we are from the wills and trust subsection, and we have really confined our thoughts and comments to the portions of the bill under the heading "guardianship," which commences at section 48. They discuss primarily guardianship of the property of an infant.

Mr. Chairman: Property meaning personal property and real property rather than the person?

Mr. Lockie: Rather than custody, yes.

Mr. Chairman: Are all three of you to be spokespersons or one only?

Mr. Lockie: I will give our submissions, Mr. Chairman, and I think my friends might or might not have one or two comments.

Mr. Chairman: Do you have a written brief for circulation?

Mr. Lockie: We did a written brief some time ago when it was Bill 140. I believe that was submitted to you or to somebody, but it is my understanding that you don't have it in front of you today. Our comments are pretty similar to those, and I can summarize the comments we make today in a brief which you can have in a day or so.

Mr. Chairman: Perhaps after your comments one of the committee members may wish you to reduce it to writing or to give it to the clerk for photostating if you would.

Mr. Renwick: If the brief under Bill 140 is substantially similar, perhaps the simplest way would be to get copies of that brief. They must be filed somewhere.

Mr. Chairman: That would be in the last session, 1980.

Mr. Renwick: There would be no significant differences, would there?

Mr. Chairman: Do you have a copy with you?

Mr. Lockie: We do have a copy. Some of our thoughts have changed as we have given it some further thought.

Mr. Renwick: Perhaps we could leave it on this basis: If

you want to submit a further couple of sheets of clarification of what is in the one that was presented before, we would have it speedily because we will not be here two or three days from now. That is our problem.

Mr. Lockie: Fine. On further review this afternoon, if I think it needs some clarification, I can get that up to you tomorrow.

Mr. Chairman, having not been here before, I am not exactly sure what your procedure was and I came prepared to give some general comments on those portions of the bill which we have been concerning ourselves with and also to discuss the specific sections on a fairly detailed basis, if that is appropriate. If that is not appropriate today, then I will be quite a bit briefer than I otherwise would be.

Mr. Chairman: Perhaps more often during what we call the public portion of our committee sitting, you make your general comments and then the members would ask you questions. The detailed clause-by-clause procedure that takes place at the end of the witnesses is the place where, as Mr. Renwick asked the previous people, you might be asked to have one of you here for this detailed breakdown and tear apart the clauses portion, the technical portion. So perhaps more general comments and questions would be in order today.

Mr. Lockie: Fine. The one specific point where we feel the bill could be improved is where it refers to the role of a guardian, meaning a guardian of property. It elaborates to some extent on that role but it does not expressly convey any authority to speak of to a guardian.

In our review of the common law as it exists today, a guardian under the common law has very little authority. To that extent it seems to us the bill, in spending this time and effort in defining a guardian and how one gets to be appointed and how one can be removed and what liabilities you have, is not terribly helpful because there will be very few instances when anyone will choose to be appointed a guardian, as they won't see any benefit in being so.

We are not aware of any instance where a guardian can demand that somebody pay money or property to him for a child. The comfort that any person gets who has assets which belong to a child is found in the Trustee Act, section 36, which permits them to pay that money into court and get a complete discharge by doing so. That is what they would do, unless it was very clearly set out that by paying to a guardian they were just as equally discharged. It is not that clearly set out anywhere, in my view. Not only can the guardian not demand assets, but it is not clear when one is entitled to pay them to a guardian.

The law reform commission said, "The role of a guardian of property as presently constituted is neither a very important nor a very taxing one." I think that remains, even after the provisions of this bill.

Apart from the question of what a guardian is entitled to demand and take possession of on behalf of the child, there remains the question of what he can do with it once he has something. In the present common law and provisions of the Minors Act, which provisions are incorporated into the bill now in section 60, it still requires the approval of the court before a guardian or anyone can dispose of a child's property or distribute its money.

In short, it is our submission that while the bill clarifies how a guardian can be appointed and confirms that he can be removed in certain situations, that he can be required to pass his accounts in certain situations, what it doesn't do is offer any real guidance as to what is expected of him. The result will be that the role of the guardian which the law reform commission found to be unimportant, will become even less important, as it would appear that the obligations and the liabilities are increased without any increase in power or function.

I know there is a reluctance to try to codify in a new statute law which has developed over many years, because there is always a risk that you will misstate it or omit some important aspect of it, but in a situation such as this where the case law, the common law today, is so limited and there is so little authority on the area it strikes us as one situation where some innovative lawmaking could be appropriate without any significant risk.

11:40 a.m.

For example, we would suggest that the legislation might provide that a guardian could be appointed to hold all the property which an infant at present is entitled to and all to which he might in future become entitled, and might impose upon him certain specific trusts. In other words, he is entitled to take possession of this property and has the duty to invest it in certain types of trustee investments, retain the capital and use the income for the benefit of the child at his discretion, and so on. It would set out whether he has power to use any of the capital and, generally, establish a code for what he is to do with the assets.

The legislation, quite easily in our view, might contain a set of standard provisions that in the absence of the specific order of the judge appointing the guardian, the following specific clauses would apply to the trust.

That comment is really the main thrust of what we are trying to say. Apart from that, we do have other comments to make on the other aspects of the bill, but it occurs to me that perhaps there are some questions at this point. Or shall I continue?

Mr. G. W. Taylor: No, continue.

Mr. Chairman: The chair was just clarifying his previous reading of the bill.

Mr. Lockie: With that background comment, without commenting on the drafting of the sections, I think I can comment on the different concepts that are contained in them. The first one

is in section 52, which contains the principle we endorse of establishing a simplified procedure for payment of small amounts of money to a parent or other person having the custody of the child. This payment is limited to \$2,000 per year and we have a comment on the drafting just to make that clearer. Basically we find that to be a good idea. It should eliminate the need for a guardian or some such person in certain cases where there are small amounts of money. They can simply be paid out to the parent, as a logical example, or whoever else has custody.

Subsection 2 states that those procedures do not apply to money which is payable under a court order. We were not sure why that exception was made and we have not been able to envision a situation where it seems necessary. Our only comment would be that that exception might be removed.

Subsection 4 of that section states that the parent or other person who receives these funds has the responsibilities of a guardian for the care and management of the money or property. Referring to our previous comment, that takes you back to the situation where you are not sure just what his responsibility is as a guardian. We would like to see that broadened a little bit to say that the person who receives that money has the duties and responsibilities of a guardian as set out, and you would name the specific sections which impose obligations on a guardian.

You would refer to section 53, which requires him to pass his accounts, and you would refer to section 54, which requires him to pay the money to the child upon attaining 18 years of age. You would refer to section 55, which would entitle him to receive compensation. There may be other sections before the bill is complete, but that would simply not leave any doubt as to what he had to do with the money and whether he had to account for it all et cetera.

Section 55 states that a guardian would be entitled to compensation. It is our assumption that the type of compensation which would be awarded would be awarded in the discretion of the court in the same way compensation is awarded to a trustee or to an executor under a will. Unless there was intended to be some difference, we would suggest that the wording in that section be more or less identical to the wording which is used in the similar section of the Trustee Act, which entitles executors and trustees to compensation.

Then there is a requirement in section 56 that a guardian post a bond. Subsection 2 states that there need not be a bond where the guardian is the parent. Our thought there is that there may be situations where the guardian is a grandparent, a brother, or an uncle or some such person, where it might be just as appropriate to waive the requirement for a bond which can be an expensive and somewhat cumbersome process. It would be easy, in our view, to state that there should be a bond as a general rule, but that at any time the court could, if it felt the circumstances warranted it, waive the requirement for a bond, or reduce the amount of the bond.

One other note there is that there is no provision in the

section for the release of a bond. As you know, once you present a bond to the court, you then have to keep paying the premium on it until it is released. Therefore, there needs to be some mechanism for getting it released. For an executive or a trustee, that mechanism is set out in the Surrogate Courts Act, but the section of the act does not apply to a guardian. So there are no mechanics, which we are aware of now, to have a bond released. It would, therefore, seem appropriate to put in some simple provision, using similar wording to that contained in the Surrogates Court Act to eventually obtain the release of the bond.

Section 57 states that upon application by a married child the court shall end the guardianship. That does not cause us any problems, but the result of that would be that anything held by the guardian would have to be paid into court. That, again, is fine. However, it occurred to us that the committee might have assumed, wrongly, that when the guardianship is terminated by court order on the application of a married child, the money then would be paid to that child. There would be no justification for that and so it would be paid into court. If something other than that was intended, it would have to be expressed.

Section 58 provides that a guardian can be removed for the same reasons for which a trustee may be removed, the main reason being for breach of his trust. This goes back to our original point that a guardian is removable for breach of trust, but he can be forgiven for not really knowing what the terms of his trust are, because our point is he does not have any clear direction as to what he is to do with the money.

11:50 a.m.

Section 60 is the section that has been more or less adopted intact from the previous Infants Act, or minors act. It is a section which requires the approval of the court to the disposition of a minor's property, or payment of assets belonging to him, et cetera. Unless it were clearly stated otherwise, a guardian would have just as much necessity to go to court to get approval as would any other person. That being the case, it would seem logical to us to insert reference to a guardian in the very beginning of that section, which now states "upon application by the parent of a child or any other person." Obviously "or any other person" includes the guardian, but considering that this section is dealing specifically with guardians, we think it should be inserted to make it clear that that applies to guardians just as much as anybody else.

Section 62 is the old concept of testamentary guardianship whereby, by one's will, one can appoint a guardian. It is a concept we had in Ontario a long time ago. It disappeared and is now being reinstituted. We are in favour of it, but we feel that its value is limited to the appointment of a person to have custody. It is my understanding that probably the family law section will tell you more clearly, but there are situations where parents die and it seems to be necessary, almost immediately, to have somebody with status to consent to an operation or to deal with the person of the child immediately.

For that reason, we think an appointment in a will has value. We cannot conceive of a situation where it is as important that a guardian of property, or somebody with status to deal with this property, is appointed immediately. Since the appointment lapses after 90 days, according to the terms of the section, in our view it creates problems. You have somebody with status for a period of 90 days. One day he has it, and a day later he has no status. He would have problems convincing people to deal with him on the eighty-ninth day when one day later he would have no status.

Our suggestion would be that testamentary appointment be only with reference to persons who have custody rather than to have guardianship of the property. We have a couple of other specific drafting points on that section, but I don't think I need mention them now.

Section 62(9)(b) says that the section applies to "any will made before the day the section comes into force, if the testator is living on the day this section comes into force." The problem with that is it doesn't seem to get us very far. Almost all wills done to date which appoint a guardian use words something to the effect that, "In the event that my spouse and I die while there is a child of mine under the age of majority, it is my wish that so-and-so be appointed the guardian of that child."

We see two problems. First, it is simply a statement of wish; it is not an appointment. Therefore, unless some clarification is made, it would not have any force under this section. Second, it simply refers to guardian of a child. We think that unless some clarification is made, it is not clear whether that means the person of the child or the property of the child.

Our view would be that the people who have put those types of clauses in their will were in almost all situations intending to appoint somebody to have custody of their child. A special provision could be inserted in the bill that would state that in a will that has already been made any reference to a guardian is deemed to be an appointment of somebody to have custody of the child. That would solve the two problems I have referred to.

There would be some risk. People have to date always been advised that that appointment has no legal effect and it is simply an expression of their wish. If we now give it legal effect, there is some thought that we should not do that because they have been clearly advised that it was not, but obviously they would never have put it in the will in the first place if they did not intend that to happen if it was at all possible. We think the balance of the good result, if I can use that term, would be to give effect to those appointments that have been made to date rather than to do nothing, which would have the result that they would almost all be useless.

Mr. Chairman: Mr. Lockie, could I address a question to you? You quoted a guardian clause that said "custody of my child." In my experience, more often the wording is "having custody of the person and estate." It goes further. As you were rhyming it off, it was ringing with me. I see more to it: "the persons and estate of my infant children." If it goes on to say "persons and estate," how

do you deal with that when we are going further down the line than just "custody of my child"?

Mr. Lockie: I guess there is another point I did not mention. The bill makes it very clear that a testamentary appointment is only valid--I am talking about custody--if it is made by the person who has custody at the time. Similarly, talking about guardians and referring to property, it only has validity if it is made by the person who is a guardian. There are very few guardians in existence at the moment. I am not a guardian of my child, and 90 per cent of the people who have made wills appointing a guardian, or whatever wording they might have used, have custody but they are not guardians, and so the appointment of a guardian is irrelevant in any event.

Mr. Chairman: My point is that if this new act comes through, if Bill 125 becomes law, if the testator is alive when it becomes law and you still have this old wording "custody of the person and estate," what does this do to the guardianship concept as you are outlining it?

Mr. Lockie: If it said, "custody of the person and the estate," as you are suggesting, that would eliminate one of the problems I referred to, because it would make it clear that it was intended at least to have custody of the person. The point is that the appointment of the person to be guardian for the estate would be of no effect because the person who has died was not a guardian in 90 per cent of the cases. The appointment of the person to have custody of the person would be fine and that would make it clear that that was what was intended. I would say, let us give effect to that expression of wish and say that is an appointment of a person to have custody, even though it might only say, "It is my wish or my hope."

Mr. Spensieri: The courts have traditionally recognized purely rogatory or wishful thinking as being an appointment of sorts.

12 noon

Mr. Lockie: I think the status of that is that the courts have seen some persuasive power in the wishes of the parents, but clearly they did not feel fettered in any way that they could not appoint somebody else.

Mr. Spensieri: In the absence of any contesting, you would say they probably follow through.

Mr. Lockie: I think that as long as the person appointed brought an application to be appointed, then that would be fine.

Mr. MacQuarrie: Particularly when there is a statement in the will that any expenses involved in the court appointment shall be borne by the estate.

Mr. Chairman: Out of capital.

Mr. Baston: If I could just reiterate a comment which Mr.

Lockie made, the ability to appoint a testamentary guardian under the legislation is limited to someone who has the status of a guardian. In the normal situation, a parent in most cases would not be a guardian; so that power to confer a testamentary guardianship would not exist. I think, in part, that is what you were getting at in the concept of the older--

Mr. G. W. Taylor: We have section 78. Like you, I drafted a few wills and I guess it was explained at the time to the testators, as Mr. Lockie has said, that these are only wishes. You can only express your intent; the court does not have to follow it. The application at the time for the child, be it custody or something else, will be in the best interests of the child and the court at that time.

But are we not going to have some difficulty with many wills out there because of this interchange of the term "guardianship and custody" or "guardian or custody" because those who are preparing testamentary devices are not being as semantically precise as the legislation is? I think they use the term "guardian" to mean custody, as in this particular piece of legislation the guardian is of the property. Section 78 was drafted to overcome some of that interchange of language or language that may cause confusion at some later time.

I bow to you because of the number of times you have drafted wills, and there are books are out there as precedents. How is this going to affect it even when we have put in section 78 as a way of solving the problem? Are we going to still create and compound confusion even if we do something retroactively, as the sections in here are not done retroactively except for that clarification in 78? Putting those two, how would you propose trying to end the possible confusion out there?

Mr. Lockie: I agree with you that the word "guardian" is used by the public, and has been for a long time, to mean custody of the child. Our point would be in that in virtually every will that is in existence today when they refer to a guardian, they are thinking of custody.

Mr. Piché: That is in my will too.

Mr. Lockie: Why most people go and do their wills is to appoint a guardian in their words, and what they are concerned about is that the person will have custody of their child after they are dead. I would like to see it clarified that those wills already in existence which refer to a guardian one way or another, guardian of the person and property or a guardian for the child, mean custody and give effect to existing wills which appoint a guardian, but treat that as an appointment of a person to have custody.

Mr. G. W. Taylor: And exclude property entirely?

Mr. Locke: Right. First, it is almost irrelevant, because so few people are already guardians. As you know, the legislation makes it clear that you cannot appoint a guardian unless you are a guardian, and a parent is not a guardian. So that is almost of no

value anyway. Clearly the thinking of all the people who made those wills was custody; so let us say that when they have said guardian they meant custody, and that is it. It has nothing to do with property.

Mr. Baston: There is an additional factor which enters into it in a number of the wills I have seen or have been involved in. Because of the old rule it was, essentially, merely an expression of a wish, or a preparatory statement: "It is my wish that so and so act as the guardian of my child." The legislation conceives of an appointment being made, and it may be necessary not only to say "guardian" as it means "custodian," but where there is an expression of "it is my wish that," that would be recognized as an appointment, because there may be some question as to whether that is in fact an appointment.

Mr. Lockie: That is the extent of our comments--unless Mary Louise has anything to add?

Miss Dickson: I just think the first point Mr. Lockie made is the most important; that is, if you are appointing a guardian, what is that guardian going to be doing? I think that should be spelled out in the statutes, and it is not.

Mr. Piché: Does not the word "guardian" in the dictionary say it all?

Miss Dickson: That does not define what duties and obligations he is going to have over the property of the infant. It appears that under present practice, which is going to be carried forward in the new statutes because the words are carried forward, he has to go to court for direction.

Mr. Chairman: Are you likening it to either a trustee or a committee?

Miss Dickson: Yes.

Mr. Chairman: You would like, in the best of all worlds, that it say that the guardian under this act shall have the capacity of a trustee--

Mr. MacQuarrie: The same powers, rights and duties as a trustee.

Mr. Chairman: --as defined in the Trustee Act, or words to that effect? That is what you would like instead of the committee, where you go to the court to propound schemes from time to time? You are saying it is like the committee now. You have to keep going back to the court to get new instructions.

Miss Dickson: Yes, except a committee is in a better position than a guardian, because a committee can propound a scheme of management. As long as he does not want to go outside that scheme, he can carry it on without going back to the court, except to pass accountant's fees or something, whereas a guardian is not given the right, in effect, to present a scheme of management.

Mr. MacQuarrie: What about section 50?

Miss Dickson: As I read it, that just goes to who is going to be applying it, not what they are going to be doing.

Mr. MacQuarrie: Where it deals with "the merits of any plans proposed by the applicant for the care and management of the property of the child, and the views and preferences of the child," is that not pretty closely related to the committee situation?

Mr. Lockie: The idea is that the guardian can go with a plan and set out what he proposes to do, what payments he proposes to make, et cetera. It should be clearer that then the court will come along, appoint him to be a guardian and direct him to conduct himself in such and such a manner.

Mr. MacQuarrie: I can certainly see that aspect.

Mr. Lockie: That is what we would like to see. You go to a court, and you are presented with an order that directs you to act in a certain manner and gives you certain powers and duties. What we are saying is it might be easy to incorporate most of those standard provisions in the bill, or to incorporate them by reference in every appointment. Then a specific appointment could set out the specific proposal that the guardian is supposed to do. In the absence of specific comments, then he would have certain statutory rights and obligations as to what he is to do with the money.

12:10 p.m.

Mr. MacQuarrie: If section 50 were amended to provide that the applicant should put forward the scheme for the management, the merits of which could then be determined as set out in clause (b) of that section, as the chairman suggested, it is a question of determining which way to go, whether you go trustee under the Trustee Act or the committee route. Right here I think we are pretty close to the committee route. It wouldn't take very much to tighten that section up.

Mr. Baston: I think that sort of amendment would be possible, perhaps earlier, in section 48, where there is an appointment. If you chose to go that way, it could provide that it would be subject to terms and conditions et cetera if a judgement may determine.

The other factor which is present and which underlines this to some extent is the alternative, as Mr. Lockie has mentioned, to having a guardian appointed, which is essentially to have money paid into court and administered there. So to some extent part of the concept, presumably, is to give a little more flexibility or freedom--although there is clearly an obligation to account and to justify what the guardian is doing--to make it perhaps a little less costly and a little less cumbersome than having presentations made to court.

There is an ability to require an accounting under certain circumstances if that committee option is elected as opposed to the

trustee option. Then, because the committee normally has, again as Peter has indicated, a little more flexibility in terms of what he can do within the scheme of management, given that extra freedom to monitor things, you may wish to require an accounting every couple of years, or a review of the plan which, by bringing everyone back to court more frequently, may to some extent frustrate the ability of being able to kind of simplify those things a little bit by having a guardian.

Having the trustee rules apply would still hold the representative to apply trustee standards but would perhaps give a little more flexibility in terms of not requiring as frequent reporting to a court or to a judge because there is less general freedom to manoeuvre.

Mr. MacQuarrie: It is something, certainly, that should be looked at by the committee when we come to clause-by-clause.

Mr. Baston: I might just add that as it is now, and as we indicated, there is nothing expressly that gives a guardian authority. Certain provisions of the Trustee Act would now presumably apply to a guardian because when it defines the concept of trust and trustee, it doesn't specifically refer to the guardian. Although, interestingly enough, there is a reference to a personal representative such as an executor and trustee, there is reference to constructive trust. So it may be that for certain of the sections, as of now, the guardian is brought in because of the constructive or sort of bare trust arrangement.

There are certain sections where there are specific references to personal representative or trustee where the guardian may not be brought in, so that it may be that the intention of the earlier legislation was that it be the Trustee Act that would govern. It may be just a matter of making that necessity of compliance with the Trustee Act a little clearer.

Mr. Renwick: Mr. Chairman, I think the presentation has indicated a lack of clarity of concept in the bill more than anything else. If I happen to be correct conceptually, I think it is important that we clear up this portion of the bill. It is unwise to leave this question of guardian for the child connoting some idea of custody. Any person or, say, any parent who was interested and was told that somehow or other, despite what the parent thought, he was not able to have the care and charge of his infant child's property, would say, looking at this, that he could go to the court and be appointed guardian for the child and would wonder what that meant.

If the intention of section 48 is to say that a court may appoint a guardian for the property of the child, then I think we should say so. Then it's specifically clear, and section 48(2) could stand the way it is because it indicates what that guardianship connotes. I think we might well give consideration to that kind of change.

I think the basic conceptual difference and problem, of course, is that the title to the property under a guardianship--and perhaps our witnesses would correct me if I am wrong--remains in

the child, as distinct from a trusteeship, where the title to the property is vested in the trustee. That's the connotation of the term, and therefore the responsibility is different as between a guardian of property and a person who is a trustee of property. I think that's an important distinction.

Again I ask our witnesses: If I were buying property that was owned by an infant child, I do not believe I would consider for a single moment that I was getting good title to that property if a deed had simply been executed by a guardian who had been appointed by the court. I think I would take the strict view that to take charge of property and have the responsibility for its care and management does not connote a power to sell.

Therefore, the meaning of section 60, as I understood it, is that a sale or disposition of property or the payment of money would be subject to an order of the court. In other words, I would take the narrow interpretation of the words "as a guardian" that if I had charge of and was responsible for the care and management of the property of a child I would not consider that I had authority to sell or dispose of property except under an order of the court.

Am I correct in those conceptual views of what we are saying?

Mr. Lockie: Yes, sir, that's our understanding.

Mr. Renwick: That a guardian does not have title?

Mr. Lockie: Correct.

Mr. Renwick: That "charge of" really means to take possession of, in a sense.

Interjection.

Mr. Renwick: Almost. It may not be exactly identical with the term "possession," but at least it connotes the view that you have the property in your possession and you are responsible for its care and management. It may well mean that you can let the child use the bicycle or whatever it is, but that's the connotation of it.

Therefore, I think we should make some changes in the language of section 48 simply to clarify exactly what it is about. I think as well that it should not be beyond the wit of draftsmen and your advisers to draft a clause that would save the wills that either now are or subsequently will be in existence that use the term "guardian" without our getting involved in adding to the problem of the magic of words in wills.

In other words, we should get some kind of saving clause in there that does not promote conflict either with wills presently in existence, which is a relatively easy thing to do, or wills that will be in existence, because they still contain the term "guardian of my children." It may not contain the magic words "guardians of the person of my child," "persons of my children" and "the estate of my children"; it may not contain all of that. So I think we should have a saving clause in there.

12:20 p.m.

I think it should be clear in section 60 that the capacity to do any of those things--that is, to dispose of or encumber land, sell personal property, make payments and so on and so forth--should all be exclusively by order of the court. I don't think it should be left up in the air that there may be some residual narrow power of sale in the hands of a guardian with regard to property, but I do think it would add weight to avoid the rigidity of that.

Regarding the proposal Mr. MacQuarrie was speaking about, the merits of any plans proposed for the care and management of the property being a part of the appointment of a guardian for the court, I think there should be a specific power in the court to approve some kind of proposal or plan for the management of the property to give the guardian some framework within which he can operate and discharge his duties effectively without going the other course.

I suppose the simplest way would be simply to appoint a person as trustee; the property would immediately be vested in the trustee on his appointment and then left to trusteeship. But I don't think we need to do that. I think we can maintain the concept of guardianship with respect to property but also provide the guardian with some ability to get to the only body that should have the authority to approve the way in which he proposes to manage and discharge his responsibility.

I think that would be extremely important also from the point of view of making guardianship an acceptable appointment. I think people begin to shy off a little bit when the enforcement provision is the posting of a bond, when I don't know when I can be considered to be in default. I think it tends to make one very edgy. I don't mean by this that there may not be circumstances where a court should require the posting of a bond. But if there is a proposal for management of the property of an infant and it is approved by the court, then in some cases the court might very well dispense with the posting of a bond in the particular circumstances.

I think it would be well if the advisers to the parliamentary assistant and to the minister on this bill could look at this whole question of guardianship over night.

As well, I think I agree that the proposal in section 62(2) should not be there. I do not think the fact that an appointment has been made by a court necessarily should give a guardian the ability by will to appoint someone to succeed him even for the 90-day period. I may be wrong on that; it may result in a rigidity that is unnecessary. I wonder whether a person who was a guardian would think about doing it anyway if it's supposed to provide for flexibility. I think there must be some other solution to that question. Therefore, I would suggest that we delete section 62(2).

Mr. Chairman, those are basically the comments I have. I appreciate the submission made this morning, because I think it has raised a number of the kinds of things that only lawyers either are

interested in or can deal with. But we all know that the one thing the courts want from the assembly is clarity when you are talking about questions related to property, and I think we have an obligation to make certain that this provision is clear. I think the points that have been made and my response to them would do a lot to clarify the provisions of sections 48 through 62.

Mr. Chairman: Mr. Renwick, are you also requesting these people, if one of them is able to be with us tomorrow afternoon--

Mr. Renwick: It would be extremely helpful if, when we get to this particular part of the bill, a member of your committee could be with us.

Mr. Lockie: I would assume that you could give us a bit of warning as to when you are going to hit section 48, and then we could come up. I don't have as much work as I would like, but I wouldn't want to sit here for two or three days.

Mr. Renwick: No, it wouldn't be two or three days. It would be either tomorrow afternoon or Thursday morning.

Mr. Chairman: Fair enough: Thursday morning. We could structure it that way.

Mr. Eaton: We can always stand it down if we get to it.

Mr. Chairman: Yes.

Mr. Renwick: These parts, in a sense, are separable, and I would have no objection if we are dealing with it clause by clause and if the committee were generally agreeable that at 10 o'clock on Thursday morning we could deal with sections 48 to 62 whether we were there or not.

Mr. Chairman: Fine. So if you could maybe be here Thursday morning that would be as well as we could--

Mr. Lockie: We can make sure one or more of us are here.

Mr. Chairman: Thank you very much. If there are no other questions, I wish to thank those of you who will not be back appearing before us. We will see one or more of you Thursday morning.

The committee adjourned at 12:29 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BILL 125, AN ACT TO AMEND THE CHILDRENS LAW REFORM ACT, 1977

TUESDAY, JANUARY 12, 1982

Afternoon Sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

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Clerk: Forsyth, S.

From the Ministry of the Attorney General:

Beecroft, D. A., Counsel, Policy Development Division
Shipley, A. Q., Counsel, Policy Development Division
Taylor, G., M.P.P., Parliamentary Assistant

Witnesses:

From Abducted Children's Rights of Canada:
Lackovic, D., Member

From the Ontario Association of Professional Social Workers:

Mann, M., Member
Stewart, M., Executive Director

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Tuesday, January 12, 1982

The committee resumed at 2:17 p.m. in committee room No. 1.

CHILDREN'S LAW REFORM AMENDMENT ACT
(continued)

Resuming consideration of Bill 125, an Act to amend the Children's Law Reform Act.

The Acting Chairman (Mr. MacQuarrie): I see a quorum present, if we could come to order.

Mr. Mitchell: Are you going gavel-happy, Mr. Chairman?

The Acting Chairman: Not really. The chairman is otherwise engaged for a while this afternoon, so I am filling in for him. We are continuing with delegations in respect of Bill 125. The first delegation this afternoon is from the Abducted Children's Rights of Canada, Mrs. Dunja Lackovic. Just come forward and make yourself comfortable.

Mrs. Lackovic: I have never done a presentation before. Do I read through our brief?

The Acting Chairman: That would be fine, if you want to review the brief with the committee and read through it. Hit the high spots and emphasize the areas you want to emphasize. Handle it whichever way makes you feel most comfortable.

Mrs. Lackovic: Thank you. I am Dunja Lackovic and I am representing the Abducted Children's Rights of Canada. We of the Abducted Children's Rights of Canada, whose members are personally affected by the devastating antisocial act of child abduction, have read with great interest the proposed Ontario Bill 125, and wish to reply to it in a general manner, and specifically to sections 19, 37 to 39 and 42.

Our critique will consist of the following: a general analysis of the portions of the bill relevant to our concern, and a specific examination of these subsections. Also, we will make some general suggestions regarding the intent of the bill and specific recommendations concerning its operation.

First, we wish to briefly describe our group and its goals. We are committed as an organization to the eradication of child abduction, this most serious form of emotional and psychological child abuse. Dr. Albert Solnit, the director of the Yale Child Study Centre, has called it a situation in which "children can be plunged into a despair so deep that it causes persistent fearfulness and distress."

We act as an emergency service for parents of abducted children, and also as a body to help in the promulgation of laws

and the change of existing legislation to prevent parental abduction of children. Our ultimate goal is to help individuals and agencies to deal promptly with, and prevent, the unlawful kidnapping of children by a parent.

2:20 p.m.

Generally, we are highly supportive of a piece of legislation of this nature because it is one step in the direction of the standardization of custody laws across Canada, and hopefully the drafting of a uniform child custody enforcement act for Canada in the near future. This will, it is hoped, prevent illegal child abduction by a parent. Bill 125 is the first acknowledgement in Ontario law, as far as we know, of the existence of the problem of parental abduction. Therefore, we as a group are interested in seeing that laws such as these carry the weight of forceful legal sanctions as well as having good intentions.

It seems axiomatic that a custody order established in one province should be acknowledged with minimal fuss in Ontario, unless, of course, there is sufficient reason to contest the original order. We feel very strongly that it is important to procure and maintain some stability for a child of separation. One way of securing this stability is having the courts refrain from interfering in original court orders, without just cause, of course. However, we are concerned that the bill gives no indication of the means of accomplishing the validation of an order without undue court proceedings.

Specifically, we would like to comment on the sections we see as being relevant to child abduction. The sections are 19, 37 to 39 and 42.

Section 19 states: "The purposes of this part"--part IV--"are...to make provision so that the courts of Ontario will, unless there are exceptional circumstances, refrain from exercising or decline jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal having jurisdiction in another place..."

Our question is: how is this to be accomplished? Through applying to the court for a hearing in order to ratify a custodial order already established? If so, we feel this would be an unnecessary step which delays stabilization to which every child has a right and a child in these special circumstances of separation has a need.

If, however, the mechanics for validating another court's custodial order consist of some simple form of central registration of the original court order, such a delay in stabilization would not occur. For the child, it would at least be minimized, so that we would support the latter solution. To reiterate, we are not in favour of a custody review hearing without just cause. We are in favour of a simplified system of registry of custody orders established in other jurisdictions.

Section 37(2) states: "Where a court is satisfied upon application that there are reasonable and probable grounds for

believing (a) that any person is unlawfully withholding a child from a person entitled to custody of or access to a child...the court by order may direct the sheriff or police force, or both, having jurisdiction in any area where it appears to the court that child may be, to locate, apprehend and deliver the child to the person named in the order."

We agree with the intent of this section. However, we strongly recommend, in order to effectively carry out the intent of this most important section, in addition to ordering the local sheriff and police to act, that an office or bureau be established under the Attorney General's jurisdiction, which would have the authority to investigate, locate and return abducted children. The bureau would embody powers described in subsections 3, 4, 5 and 6 of section 37, as well as performing any other action or instituting any emergency mechanisms deemed necessary by this office in the locating and return of a child who has been abducted. This bureau would have the full co-operation of the police and sheriff ordered by a court to locate, apprehend and deliver an abducted child. Such an office would centralize all the varied efforts involved in the location, apprehension and delivery of abducted children with a minimum of delay.

We also recommend that such order be directed to the police and that the police be given the power to act on it, because the sheriff's office is not available after business hours and weekends when incidents of child abduction generally occur. They usually occur on weekends when the visitations take place.

Section 37(7) states: "An order made under subsection 2 expires six months after the day on which it was made, unless the order specifically provides otherwise."

We would recommend that such an order be made to expire only when the child is returned, as it would save the applicant from repeatedly returning to the court for an order. For example, the applicant may have to be absent from the jurisdiction or from the country for a long period of time on a mission to retrieve the child.

Section 38(3) states, "An order mentioned in subsection 1 or 2 may require a person to do any one or more of the following...(4) Deliver the person's passport, the child's passport, and any travel documents of either of them that the court may specify to the court or to an individual or body specified by the court."

It has been the experience of members of this deputation that provisions such as 38(3) and (4) and the related section 38(6) are futile unless the appropriate authorities are advised that such documents have been confiscated and no substitute documents may be issued. This applies not only to the issuing authorities but to border policing authorities as well.

Section 39(1) states: "In addition to its powers in respect of contempt, every provincial court (family division) may punish by fine or imprisonment, or both, any wilful contempt of or resistance to its process, rules or orders under this part, but the fine

shall not in any case exceed \$1,000, nor shall the imprisonment exceed 90 days."

We believe that a fine of \$1,000 would be a travesty of either deterrent or attributive justice. A far more meaningful fine, possibly decided upon individually and taking into consideration an individual's circumstances, is needed for effective punishment and deterrence.

Section 42 seemed to our members sufficiently unclear that it seems to us to negate the intent of the whole bill, as in section 19, which states that "The purposes of this part are to make provision that courts of Ontario will, unless there are exceptional circumstances, refrain from exercising or decline jurisdiction in cases where it is more appropriate for the matter to be determined by a tribunal having jurisdiction in another place.

It seemed to us that, contrary to the intent of the above, section 42 implies that the courts of Ontario take it upon themselves to review all orders of other jurisdictions. In other words, this item seems to call for some clarification.

Our largest concerns with this bill are in terms of its generalized implementation. There are many exigencies wherein an Ontario court may decline to exercise another jurisdiction's order, and what emergency mechanisms can be invoked to effectively carry out the intent of section 37.

We must emphasize as a group, as individuals, that without emergency mechanisms the purpose of this bill cannot be carried out. Therefore our recommendations are as follows.

1. The establishment of a central registry in Ontario where custody orders originating outside the province may be registered with a minimum of delay or formality.

2. The establishment of a bureau to locate and return children abducted by a noncustodial parent or other person, this bureau to be established under the jurisdiction of the Ministry of the Attorney General of Ontario, with authority to investigate, locate and return abducted children, as well as performing any other action or instituting any emergency mechanisms deemed necessary by this bureau for the purposes of locating and returning a child who has been abducted.

3. When a passport or travel document is delivered by order of a court into safe keeping, the appropriate authorities be advised that such documents have been confiscated and that no substitute documents be issued; to be applied not only to the issuing authorities, but to border policing authorities as well.

4. That the fine for contempt of provincial court orders be raised to a meaningful level in order to act as an effective instrument of deterrent and retributive justice; the fine to be set taking into account individual circumstances.

5. To clarify section 42 of the bill in order to enhance the consistency of the bill.

2:30 p.m.

The Acting Chairman: Thank you, Mrs. Lackovic. Do the representatives of the ministry have any comments to offer with respect to the presentation that has just been made?

Mr. Shipley: I might just provide some information for members about abducted children's rights.

The sections you have addressed today are now contained in the Uniform Child Custody Jurisdiction and Enforcement Act that you referred to in your opening remarks. The uniform child custody jurisdiction act was adopted by the Uniform Law Conference of Canada last August at its meetings. The Uniform Law Conference was made up of representatives of government, the private bar and law reform commissions, and that model act will now be recommended for adoption by all provinces and jurisdictions in Canada. It would replace the present uniform act dealing with extraprovincial custody orders enforcement.

We now have in the children's law reform bill, as well, provision to implement The Hague convention which deals with abduction of children. I just thought I would like to bring that to your attention.

The Acting Chairman: Any questions or comments from members of the committee? Mr. Mitchell.

Mr. Mitchell: I have one question based on the comments you just made. I have forgotten the other document you mentioned. Are you telling me that the concern that has been expressed about passports and so on is covered in other acts or bills?

Mr. Shipley: What happened is the Uniform Law Conference of Canada took this bill and used it as the basis for developing a model uniform act for all of Canada. So the provisions in this bill with respect to passports are contained in this new uniform model act that is being recommended.

Mr. Mitchell: With similar wording to this?

Mr. Shipley: Exactly the same wording.

Mr. Mitchell: It is all well and good to take a passport and all of those necessary papers away from a person, but you know and I know that it has appeared to become almost too easy, at least in Canada over the past number of years if one believes everything they read in the newspapers--I know David is always accurate--but if one can really believe what is written in the papers, the fact of obtaining a duplicate passport and so on has appeared to be not too difficult to do.

So it is one thing to take the documents, but I think at the same time, surely External Affairs in Ottawa would be informed as a matter of course. If it is not as a matter of course, then it should perhaps be written in here that they will be informed and, as well, that all Customs entry ports in Canada will be notified. I

would like some response on that because I see that as being quite a concern, really.

Mr. Shipley: It is a concern if the parties or their counsel have not bothered to inform the passport office that the passport has been suspended. It is really a matter of sending External Affairs a copy of the order and then they will deal with it. They have a system set up to run checks on all suspect passports. If, on the other hand, the person makes a fraudulent application under another name or whatever, there is nothing the passport office can do to prevent that.

Mr. Mitchell: Perhaps not. I am looking at degrees of difficulty here if this were amended to say that whoever took those papers at the same time informed the Customs people and so on. I agree they can obtain some fraudulent papers, perhaps. I am not sure whether they ever do a photo comparison of people who have applied in the past. But there surely must be ways of really answering to the concerns raised here to say, "Bearing all of this in mind, and maybe there are some difficulties, nevertheless, we will direct the necessary steps be taken as much as is within our area of control."

Mr. Shipley: I think what we have in the bill is about as far as the province can go because passports are, of course, a federal matter.

Mr. Mitchell: I take issue with that particular thing. I think the province could do far more than as I read section 4, "deliver the person's passport," and so on. I think we can surely do more. We have enough committees and other lines of communication between ourselves, the province and the federal government so that we should be able to do more. I am giving strictly my opinion. I think we should be able to do more in that area.

If one goes back to newspapers, surely that is where the concerns are being raised about people who have abducted children and they have gotten out of the country. I can appreciate you are trying to tighten up by the way it is worded. What is being asked for here is that--we indicate in that tightening up, we will not only take the papers but we will inform all the people necessary to make sure we, as much as possible, try to close any avenues.

Mr. Shipley: In many cases, the parties are doing that themselves now and there is nothing to prevent them--

Mr. Mitchell: But why should we not do it? That is the question. You are trying to say somebody else should do it. Why?

Mr. G. W. Taylor: I think Mr. Shipley explained that earlier, Mr. Mitchell. The greatest difficulty in this is the feature of passports being a federal jurisdiction. There would even be some concern, as Mr. Shipley expressed it, whether they have the ability and the jurisdiction to make the order as it at present stands, such as delivering each person's and child's passport. One probably might check and discover the property in such passports belongs to the federal government.

Mr. Mitchell: I think that is stated on the passport.

Mr. G. W. Taylor: The other feature is when you are asking a judge or a court, being the provincial or Supreme Court, as the case may be, informing administratively all the different passport points of entry throughout Canada, the administrative task becomes tremendous.

Mr. Mitchell: Perhaps I am not making myself clear. I am just saying that surely we have enough lines of communications. We inform the necessary umbrella agency in the federal government and they then do the informing of the federal agencies that control border points and so on. I do not think we can do it ourselves. I grant you that.

Mrs. Lackovic: The problem that mostly occurs is that, even though the passport is confiscated, it is very easy for one to cross the US border without the passport if one has a driver's licence. If the border crossing had been advised of persons who are not to remove children from Ontario, maybe in a spot check they could just stop somebody or report somebody.

The problem with passports now is also in the applying for a passport. If you are a married person and you are applying for the child's passport, you do not need the other parent's signature. But if you are separated or divorced, you do require that signature. It is very easy for one to pretend or say he is still married and skip that other requirement.

Mr. Spensieri: A lot of times you are not even relying entirely on the co-operation of the domestic jurisdiction. We have had situations in our office where you make a provision for the surrender of passports in a separation agreement so that there is no possibility of abduction.

Then you notify the appropriate consul or authorities of a particular country that there is this provision and they say: "No, sorry. If Mr. X shows up and he is entitled to obtain a substitute passport"--for instance, the Italian embassy will issue as a matter of course a replacement passport to a father if he qualifies under their criteria and off they go. They have a passport and the child has a passport and they leave. I do not think a court order of this nature would carry any more weight with a foreign embassy if they wished to be facilitating and accommodating to a national of that country.

Mrs. Lackovic: We have found that in 80 per cent of the cases, the children are taken without any child documents.

2:40 p.m.

The Acting Chairman: Mr. Renwick and Mr. Laughren had their hands up almost simultaneously. Which one wants to speak first?

Mr. Laughren: On page three of your brief, you referred to the centralized bureau which centralized all the "varied efforts involved in the location, apprehension and delivery of abducted

children with a minimum of delay." Do you see that as a provincial bureau? What good would a provincial bureau do when a lot of the problems are interprovincial?

Mrs. Lackovic: It certainly would help if it started as a provincial body. Maybe all the other provinces would establish something similar. We really would like to see some central registry for all the custody orders that you can refer to in case of abduction and where you can get advice or where there could be a centralized information bank. It certainly would help if you could phone the bureau and ask them what you can expect from the police. Maybe they can help and direct you.

Mr. Renwick: There are two or three things I do not understand. I would have been happier if section 42, which deals with the enforcement of foreign orders, had been broken down into two parts, one dealing with foreign orders in the sense that they are orders of another jurisdiction within Canada, and other orders.

I tend to agree with the submission which has just been made to us that, in a very real sense, section 42 seems to leave it wide open to the court in Ontario almost to conduct another hearing, whereas, at least so far as orders in other provinces of Canada or in the territories are concerned, it should be, in my judgement, automatic that we would treat with the same respect an order of those courts as we would an order of our own court here.

We should recognize that sort of comity, or "give full faith and credit," I guess is one expression that is used, to the orders of other courts within Canada but which are strictly in technical, legal terms, foreign jurisdictions, and then leave the problem with respect to other jurisdictions' orders somewhat wider so that one of the grounds, such as the order of the extraprovincial tribunal is contrary to public policy in Ontario, might well have some force and some application but would be limited in its force.

I do not think we should lump together, unless I have misread the bill, orders of other courts in Canada with orders of other courts all over the world. That is one comment.

Mr. Mitchell: As a supplementary to the point you are raising, I would ask as a matter of information to myself: It has been my understanding that there is great difficulty in Canada or has been. Some provinces do not recognize orders established in Ontario and so on. Is that specific problem by itself being resolved? Are we getting a national response to that type of thing?

I will tell you quite honestly, the very thing that is before us now was raised with me in my constituency several times. The way the concerns were raised with me about what can happen within our own Canadian boundaries was rather astounding if the points people were making to me are correct. I would hope we are reaching a point where each provincial jurisdiction is going to recognize and accept--and I say that not as a student of the law, but unless there are some very weird circumstances--and are going to recognize orders or decisions made in other provinces. You have nodded that that is happening.

Mr. Shipley: That is the intention of section 42. It is an elaboration of what now exists under another piece of uniform legislation called the Extraprovincial Custody Orders and Enforcement Act.

Mr. Mitchell: Is it possible to get a copy of that? Is it a lengthy thing?

Mr. Shipley: No, it is not a lengthy thing. The difficulty we are in is with all the work we are handling in this committee. We have two uniform acts on the enforcement of custody orders, the old one which is in force in a number of provinces now, and the new one that was adopted last summer.

We have conflicts between federal and provincial jurisdictions, and a number of problems arise in enforcing custody orders made ancillary to divorce. The provinces do not have much control over enforcing those; that is a separate system. So when people come to you and say they have a problem enforcing a custody order or varying a custody order, it may be that it was a custody order that was made on divorce, and the provinces have very little control over that.

Mr. Mitchell: One final supplementary: Perhaps, then, for the uninitiated, you might be able to put on a single sheet of paper what the current situation is. You say that there is an overall, encompassing thing, but I gather from what you are saying, it has not been enacted by all provincial legislatures. Would it be possible to show the provinces which recognize Ontario orders and the provinces whose orders Ontario recognizes?

Mr. Shipley: Ontario has not had any legislation until this time. That is what section 42 is intended to do.

Mr. Mitchell: Sorry to have interrupted you.

Mr. G. W. Taylor: To get back to Mr. Renwick's point: With respect, Mr. Renwick, we are assuming that this section 42 deals within the different jurisdictions of Canada as well as outside.

Mr. Renwick: It deals with all other jurisdictions?

Mr. Shipley: Yes. That is what the previous uniform act did and it is what has been found acceptable for the new reform act, as well. They did not see the need to distinguish between the two types of--

Mr. Renwick: I would like to take issue with that particular point. It has been a very real problem as to whether or not an application to enforce an extraprovincial order becomes a new hearing, or a hearing de novo. That has always been one of the problems, regardless of what it is.

I make a plea to you to, overnight, prepare a section which will divide 42 into two parts, one with respect to giving full faith and credit to orders of other provincial courts throughout Canada, including the territories. You can add another condition,

if you wish to, such as they will have laws substantially to the same effect as ours, or whatever you want to say, because I understood your adviser's earlier interjection was that this bill is likely to form a model of sorts for other jurisdictions in Canada. Whatever other condition you want to attach to it, fine.

I just do not think in this day and age that we should persist in the ancient problem of reciprocal enforcement in a simple way in matters related to custody where we are talking about other jurisdictions in Canada. I do not think, except for the lawyers' refinements, that there is a substantially different attitude of people and of the courts and of their legislatures toward this problem among the various jurisdictions in Canada that we should provide this opening for delay in the enforcement of orders granted in other jurisdictions within Canada. I can well understand, with the multitude of other jurisdictions outside Canada, that you would have to have a wider ambit. However, I leave that matter for your consideration.

2:50 p.m.

I do not understand what happens when Ontario adheres to this new convention and all of the other provinces in Canada adhere to the new convention. Does the convention then govern, or are we in the position that lawyers must, with a finetooth comb, go through the convention to find out if a particular clause conflicts with a particular clause in our act and if there is an override for the convention over the particular clause in the act? It would seem to me that that will provide a field day for the lawyers, who can argue every case as to whether or not there is a conflict between this section and any other enactment where this section prevails. That is a wide open sesame to put money into the pockets of the lawyers at the expense of their clients and the public good.

Mr. G. W. Taylor: Mr. Renwick, there are some general provisions. Doug Beecroft, who is with the staff of the ministry, has some greater detail and I will bow to him to explain fully the intent and how it would work in specific situations.

Mr. Beecroft: The Hague Convention is an international convention that applies between different nations. It does not apply as between different jurisdictions in Canada. Therefore The Hague Convention does not apply where a child from Alberta is brought to Ontario, or vice versa. In that respect the parties have to rely on the law of Ontario.

The Hague Convention is also different from the other provisions of Bill 125, in that generally Bill 125 operates unilaterally; in other words, someone in another country can apply in Ontario under section 42. In order for him to have that right, it is not necessary that that country give the same right to Ontario residents who want to obtain children in the other jurisdiction.

The Hague Convention, however, is a reciprocal convention. It only applies when both countries have implemented the convention. We have no obligations under The Hague Convention to any country

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other than those that have ratified the convention and therefore undertaken obligations to us.

The other comment I should make is that The Hague Convention is not exclusive. It does not require you to make use of The Hague Convention. Say, for example, that both France and Ontario implement The Hague Convention. A person in France would have the option of using The Hague Convention or of applying under the other provisions of Bill 125. The Hague Convention continues that option. It expressly recognizes that.

Mr. Renwick: I am sure we can get into some of those refinements when we come to the clause by clause discussion, but I sense what Mr. Beecroft is saying is that regardless of The Hague Convention, relationships among the provinces will remain untouched by the convention.

Mr. Beecroft: That is right.

Mr. Renwick: It seems to me that is an additional reason for separating out section 42 into two parts; those related to foreign orders limited to the other provinces and territories of Canada, and foreign orders otherwise applicable.

The Acting Chairman: At this point I would like to relinquish the chair to the chairman. Apparently there is a telephone call for me.

Mr. Renwick: I was getting on well with you.

Interjections.

Mr. Renwick: I do not understand what happens on the other matters. Perhaps you know or do not know, whenever this matter of parental kidnapping comes up, we are of course faced with the code. We have that strange provision in the code which seems to relieve against the kidnapping concept in the case of one parent kidnapping from another parent, in section 250 of the code.

Anyone would have thought that to take a child from the custody of the person who has lawful custody by order of a court should have no real distinction from kidnapping under 247 and should not have the benefit of a special provision of the Criminal Code.

I understand the amendments to the Criminal Code of Canada are supposed to tighten up section 250. Could the ministry respond to my question as to what the state of that matter is and what the position of the province of Ontario is?

While we can talk all we want about the Hague convention and imposing slightly additional enforcement powers on our courts by way of enforcement of the orders and punishment for contempt, nevertheless, we get to the Criminal Code. What use is going to be made of the code? What is the position of the province on the questions of the amendment to section 250? Why don't we simply eliminate section 250 entirely and leave it to have the deterrent

effect of the regular kidnapping provision? I don't know whether the parliamentary assistant heard me.

Mr. Beecroft: I can try to get you copies of the Criminal Code amendments. I don't know at what stage they are.

Mr. Renwick: They have been around for quite a while. I don't know what stage they are at. I would like to know the position of the ministry on the proposed amendment to section 250 of the code. What is its position?

I would like to know, if it is convenient--I shouldn't say convenient; if it is within the capacity of the information retrieval operation of the ministry to obtain the information--to what extent 250 has ever been successfully used for the purpose of preventing parental abduction.

Mr. Beecroft: I guess aside from looking for reported cases, I am not sure we will get much on that. We will look and see if we can find any.

Mr. Renwick: Yes. Don't go to too much trouble. I don't think we will find too many one way or another. I would be interested to know if there had been any successful prosecutions under section 250 in Ontario.

How does that question relate to section 39(1) dealing with the additional powers of the court to punish by fine or imprisonment or both any wilful contempt or resistance to its process, with the limitation of \$1,000 and the imprisonment for 90 days? We have heard the request this morning that the penalty be raised, and we heard it again this afternoon. What is the problem with respect to a somewhat more appropriate fine or imprisonment punishment under this act, considering the seriousness of the problem?

3 p.m.

Mr. Shipley: Perhaps I could speak to that. The level of the fine was a matter that was discussed when the bill was in committee last time and the Abducted Children's Rights of Canada group was here. It was pointed out then that section 39 was not meant as a penalty for kidnapping; it is a general penalty for contempt of court. It would deal with all sorts of matters that could arise under the Children's Law Reform Act. The level of penalty was taken from the Family Law Reform Act where, again, it is a \$1,000 fine and you are dealing with a wide variety of contempts. That was felt to be reasonable.

Mr. Renwick: This is the maximum that is imposed. Is it not always within the discretion of the court to decide what the level of the punishment will be for contempt? What is this additional power which is being given to the courts? Why do you feel it is necessary to put either a limit on it, or such a low limit?

Mr. Shipley: I think the rationale with respect to the Family Law Reform Act, from which we took this provision, was that

a provincial court does not have jurisdiction to find a person in contempt out of the face of the court. There had to be specific statutory authority for that. This provision does deal specifically with provincial court, family division. The other courts have their own contempt powers.

Mr. Beecroft: There is a provision in the County Courts Act, for example, that gives county courts the power of contempt--I think it is a \$1,000 fine there. The Supreme Court, as a superior court of record, is the only court which has power, inherent jurisdiction, to fine for contempt out of the face of the court.

Mr. Renwick: Yes. I understand that. I am afraid that if one were sitting on the bench--for example, when the parliamentary assistant is sitting on the bench, I think he would look at this section and he would say, "I guess what they were really saying to me is that they have not only limited the special power they have given me to \$1,000 or imprisonment not exceeding 90 days, but my power to punish for contempt in the face of the court is also limited." Indirectly, you have told the court that its power is to be treated very leniently in these circumstances. I do not mind giving them the additional power, I just do not understand why you put the ceiling on it, or why you put the ceiling so low.

Mr. Shipley: I do not think I can add to what I have said.

Mr. Chairman: Mrs. Lackovic has a comment.

Mrs. Lackovic: With respect to the contempt of court charge and the fine of \$1,000, from our experience it has usually been looked upon as a ceiling. I know from my personal experience that the person got away with just apologizing to the court and was forgiven for his actions.

Mr. Spensieri: Of course, Mr. Chairman, in most instances the jailing alternative is also meaningless. I just want to ask the ministry if they have given any thought to considering, much as we do in criminal cases, the imposition of a surety or the posting of an amount as a possibility under the penalty section.

Mr. G. W. Taylor: It is not under the penalty section, but there is, in some of the orders, a provision for sureties. I guess the difficulty in section 39 is that in all contempt one can wash the contempt by apology to the court, as the witness has stated.

The limitation of \$1,000 and 90 days, as Mr. Renwick has suggested, might lead some judges to think it is not a serious offence in that one would say if the figures were higher, given today's economic limitations, we see in environmental situations the fines are much larger maximums, and the imprisonment. One can only conclude, as Mr. Shipley has said, that it is to keep it in uniformity with the other legislation which is at present in the jurisdiction of the province. Other than that, I can see no reason for it being set at \$1,000 or 90 days.

Mr. Renwick: Would you reconsider that overnight?

Mr. G. W. Taylor: I will reconsider everything overnight, Mr. Renwick, and I will speak with the advisers and the ministry people. It might not be overnight, it might be when we go to clause by clause, but we will consider it.

Mr. Renwick: I think the only other matter is that I do think it would be simple for the court process in Ontario, when they actually lift a passport or other travel document, for the court to assume the responsibility of sending the order to External Affairs in Ottawa. It does seem to me that is a very simple procedural matter which should not cause any conflict. I understand wide awake and knowledgeable lawyers in the field do it automatically. I am sure there are a lot of lawyers practising in Ontario in odd situations who do not happen to think of that particular item. I know Mr. MacQuarrie would because he just has to walk across the street and give it to Mark MacGuigan and that would be it.

We should not leave that small additional matter to chance. If the court considers that lifting of the passport is a matter that is significant to the terms of the order, it seems to me easily done for the court to send a certified copy of that order to External Affairs to have it noted in the register which they keep. I presume an imaginative parent trying to kidnap a child is likely to try to get a second document one way or another and they are not always caught. I make that as a further suggestion arising out of the submission that has been made to us today.

Mr. Chairman: Mrs. Lackovic, thank you very much for your presentation and for coming here today.

Mr. Renwick: If by any chance it is convenient, and only if the minister's advisers who are here today would not be upset by it, when we come to this convention question, Mr. Leal might be asked to be present to explain to us any of the problems involved. Mr. Leal is presently retained by the Premier (Mr. Davis) to advise him in constitutional matters. He was the one who played a major role in this and I think it would be helpful to the committee if we had that kind of basic understanding.

Mr. G. W. Taylor: Yes, Mr. Renwick, I recognize your request in regard to Mr. Leal's information.

Mr. Renwick: I would not want to upset Mr. Beecroft.

Mr. G. W. Taylor: Mr. Beecroft bows to Mr. Leal's knowledge, experience and background in this particular matter. It is a matter of making the request. I do not know where Mr. Leal is now. He has had three or four movements in the last few weeks.

Mr. Renwick: But he is still retained, I believe, by the government.

Mr. Chairman: He is somewhere in a government position, and providing his schedule allows, I see no difficulty in bringing him forth because he does have the most perfect knowledge available on this particular subject. He did the negotiations in European circles in bringing it to Ontario.

Mr. Renwick: Perhaps the clerk of the committee could let Mrs. Lackovic know when Mr. Leal is coming because she might be interested in hearing Mr. Leal's explanation, if it is possible to arrange it.

3:10 p.m.

Mr. Chairman: I was going to ask the committee, when would you prefer if Mr. Leal and a representative from the official guardian's office come, if we have a choice? Tomorrow afternoon?

Mr. Renwick: I would assume that the bar association is not going to take all morning tomorrow. If it was possible to get the official guardian in later on in the morning of Wednesday, January 13, and if Mr. Leal was available, then presumably we could have Mr. Leal in the afternoon. Again, that is a special section of the bill. I don't think we have to be locked in to a seriatim discussion.

Mr. Chairman: I am advised the Canadian Bar Association has quite a large brief.

Mr. Renwick: Then we could deal with the Hague Convention on Thursday afternoon.

Mr. Chairman: We should also bear in mind that this morning we advised the wills and trusts section of the bar association that we would quite likely be dealing with those sections Thursday morning.

Perhaps the clerk can try to get the representative from the official guardian late tomorrow morning and Mr. Leal leading off tomorrow afternoon, if possible.

Mr. Renwick: Whatever you fix on.

Mr. Chairman: Fine. Does that appear in order? We can carry on.

Are the representatives here from the Ontario Association of Professional Social Workers? Mr. Stewart and Mrs. Mann?

Mr. Stewart: Mr. Chairman, I would like to present a brief, and I brought with me this afternoon Mrs. Marion Mann, who is a member of our association and is also on the staff of a Toronto law firm that specializes in family law. She has particular knowledge of and experience with the matters under discussion and I have assist and elaborate in answering questions to our presentation.

I would like to begin by making a few introductory remarks to identify our organization more clearly in your minds. The Ontario Association of Professional Social Workers is the professional discipline organization of social workers in the province. Its members are social work practitioners who have earned a recognized university degree in social work at the baccalaureate, master's or doctorate level or their equivalent, or are students enrolled in university programs leading to these degrees or their equivalent,

or are practitioners who have successfully completed a prescribed program of study, supervised practice and examination known as the membership certification program.

The OAPSW has 1,490 active members who are practising full time or part time in Ontario and 450 student members. We are very pleased for this opportunity to comment on Bill 125. We regret we have been unable to conduct as thorough a review and analysis of the bill as we would have desired. Our comments have been prepared on short notice and in consultation with a number of colleagues whose practice includes assistance to the court in the form of assessment and mediation services and who are familiar, through their work, with other matters dealt with in the bill.

The members of OAPSW who have been consulted are of the general opinion that Bill 125 is sound legislation that serves to codify what commonly takes place in practice. We are particularly pleased with the way in which the bill incorporates the principle of giving precedence to the best interests of the child over other considerations and also with the treatment of extraprovincial matters and with the incorporation of the convention on the civil aspects of international child abduction.

None the less, we wish to draw the committee's attention to a number of issues in the bill that should be addressed in order to improve its effectiveness. We have focused our attention on sections 30, 31 and 32, having to do with custody and access assistance to the court and sections 35 and 37, having to do with custody and access enforcement. We also wish to make comments related to sections 20, 24 and 25.

With respect to section 30(1), we would applaud the bill's acknowledgement that persons appointed by the court to assess and report regarding custody and access must possess technical or professional skill, although the means by which this is to be determined remain undefined in the bill. We do suggest, however, that it be required for the assessment report to include recommendations to the court regarding steps that should be considered in the best interests of the child.

With respect to section 31(1), it is our opinion that the reference in section 30(1) to technical or professional skill also be included in this section. We are concerned that the bill does not acknowledge the need for standards for mediation services and the importance of persons providing mediation services to possess the knowledge and skills necessary for assessment as a prerequisite.

Practitioners of a number of disciplines, including a number of social workers, are experienced and skilled in providing assessment services to the court. Some have also developed the special skills necessary for effective mediation in matters of custody and access. We believe that social workers may be particularly well equipped, by virtue of their education, training and professional commitment, to assist the court in carrying out its mandated responsibility under this bill.

We realize that the specific naming of social workers and other appropriate professionals in the bill may be problematic due

to the present lack of professional regulatory legislation and the lack of clearly delineated standards of practice for assessment and mediation. We recommend, however, that an appropriate means of selecting persons to provide these services to the court would be through reference to the recognition of technical or professional skill by their professional discipline organizations and their membership in good standing of such organizations.

We are concerned that the bill as it presently stands leaves it open for untrained and unskilled persons to be appointed as mediators. On the other hand, we do not wish to see assessment and mediation services provided exclusively by members of those disciplines that are presently licensed or registered.

With respect to section 32, we recommend for consistency that access as well as custody be included in investigations and reports by the official guardian. While we recognize that section 32 has been influenced by a very similar clause in the Matrimonial Causes Act, we are concerned that listing of the areas to be investigated could preclude certain areas not listed; for example, health and religious training of the child. As an alternative, it may be preferable to encompass all possible areas of investigation in a general phrase, such as "custody, access and needs of the child."

In examining this subsection we were unclear as to the rationale for an investigation by the official guardian as an alternative to sections 30 and 31. We note that section 32 makes no reference to technical or professional skills and this raises the question for us whether investigations by the official guardian are required to meet the same standards as assessments conducted by persons appointed under section 30(1). Moreover, we are concerned that the official guardian may be called upon to assist the court in cases where the parties are unable to pay the fees and expenses of a person appointed under section 30(1) or section 31(1).

3:20 p.m.

With respect to section 35, this section appears to give recognition that mechanisms may need to be developed to ensure that all persons involved are enabled to continue their relationships following an order for custody and access. We suggest that it would be valuable to consider the inclusion of guidelines which would clarify such matters as:

1. When supervision of custody is appropriate.
2. What the purpose of supervision is; first for the child and second for the court.
3. The basis of accountability; that is, to whom does the supervisor report and for what period of time.
4. Who is to bear the cost of supervision.
5. What authority does the supervising body or person have.

Our members are aware of situations in which, for example, an older brother or sister may be appointed by the court to supervise

access to a younger sibling. Such situations can and do occur since the community does not yet have a system for providing access supervision when a children's aid society or a family cannot do so. Even when a family member is willing to provide supervision, there are usually conflicts of interest and emotional involvements that make such arrangements less than satisfactory, especially when the person acting as supervisor must apply authority.

With respect to section 37(1), in our opinion the safeguarding of access should give due recognition to the degree of involvement, both for the adult and for the child. Apprehension for purposes of a visit seems to be somewhat excessive, although for the purpose of custody, it may well be valid. The use of force, which is implied by apprehension, to deal with incidents of access is inappropriate. We suggest that access should be removed from section 37. Failure to abide by access orders should be returned to the court for referral for an assessment or if the parties agree, mediation.

We support the intent of section 37(4) and (5), notwithstanding the difficulty they may cause the sheriff or police force involved. In order to protect children it is sometimes necessary for parents with custody rights to be assisted by the police.

On section 37(6), we wish to express curiosity about the rationale for restricting entry or search under subsection 5 to the hours "between sunrise and sunset." In our experience in many cases crises occur at night. Moreover, the period of time between sunrise and sunset literally interpreted varies from season to season.

We are aware that civil rights may be at issue here but suggest that the rights of the child should be of concern as well. If the location of a child should be discovered late in the day after a lengthy investigation, this subsection would appear to prohibit an entry and search for purposes of apprehending the child until the following day.

We are concerned that the effect of section 20(4) may be to increase the tendency for hostile parents to remain in the matrimonial home with the children, in order to protect their claim to custody pending a separation agreement. Since separation agreements can often take an extended time to complete, this situation may not be in the best interests of the children involved. This subsection may cause particular hardship for absent fathers who wish to retain responsibility for decisions affecting their offspring that require custody rights pending a separation agreement.

We suggest that section 20(7) be amended to include any subsequent amendments to an original separation agreement in order to accommodate the need for changes without the necessity of returning to the court each time a change is agreed to.

Finally, with respect to section 25 we would question whether the court should have the option of declining to exercise its jurisdiction if the conditions of sections 22, 23 or 42 are met. We suggest that if the conditions of these sections are met, the court

should be required to hear the case and make a ruling or, if this is not possible, to list its reasons for declining to exercise its jurisdiction so that recourse to appeal is available.

These are our comments on Bill 125 and we thank you for the opportunity to present them.

Mr. Chairman: Thank you very much. Are there any comments?

If I may interject, the assistant deputy official guardian is the highest official in that organization we could obtain. Mr. Perry is away and the next person in line has recently left the official guardian's office. That person will attempt to be here at 11 o'clock.

We are also advised that Dr. Leal--he changes hats, as I see him, from decade to decade--is in England. Is there anyone you would like to see in his place with regard to background? I guess we will dispense with Dr. Leal's attendance.

Mr. Renwick: I assume that when the House comes back and if there were any reason for doing so, we could always arrange an hour with him later on if he is available and if it would be helpful to the committee.

Mr. Chairman: Are there any questions of the Ontario Association of Professional Social Workers regarding their brief?

Mr. Renwick: I guess among us lawyers in the room we cover quite a wide span of different times when we were called to the bar. I have problems, and I am not suggesting necessarily that the witnesses can help me with them. But the first time I ever ran across the question of custody was in school, where I was told that the test was always the best interests of the child. But I am constantly told now that they have discovered a new test called "the best interests of the child."

I have difficulty understanding what has happened. I think it is fair to say, and Mr. MacQuarrie, Mr. Taylor, Mr. Spensieri, Mr. Elston and my friend the former mayor of Sudbury would all say that the test for custody was the best interests of the child.

I am curious about what is happening here; whether we are being conned, or whether something has been removed, and polished up and presented to us as the test. But that has been the emphasis in this bill since the first time I heard about it--that it is the best interest of the child.

Mr. G. W. Taylor: Let me address that too. I am little behind you but I came from the same instructional law. In a custody case that was the test, the best interests of the child. When I was given the opportunity to bring forth this legislation and bring it into committee as well, I noticed some of the same material, "the best interests of the child," in the material provided to me by the ministry staff. I had to read it two or three times and go back over it and try the same test you are using for it because some of the material in the legislation is not novel.

I think where the novel part is now is to try to give the procedure and the procedural part of it, and to make it develop in the best interests of the child, as well as what comes after you make the order and complete all the procedural part. Previously some of the procedures of the different courts, the different bodies dealing with the children, did not always deal with the best interests of the child. They might have been slow. They might not have had the provision for the passport situation. They might not have had the securities, the bonds and some of those other features that happen to be proposed in this legislation.

That is where the novel part is coming in, that not only should the court look to the best interests of the child in making its final, ultimate order, and those orders as they go along varying it as a consequence of changes in circumstances, but the procedure itself should be in the best interests of the child. That is where the difference is at this time, and not that we are trying to create a new theory in law. I think Mr. Shipley would concur in those views. He may add his own, having dealt with this on the two occasions it has been before committee.

3:30 p.m.

Mr. Shipley: I certainly agree with everything Mr. Taylor has said. I would just go on to point out that, although the Family Law Reform Act in 1978 said specifically, in statutory language, that "the best interests of the child" would be the test to be used in awarding custody, if you look at the old Infants Act, now called the Minors Act, which, until 1978, was our only provincial custody statute, you do not find the phrase "the best interests of the child." You find "welfare of the minor," which is also equated with the conduct of the parties, and the wishes of the mother and the father.

It is this primacy of the best interests of the child over the conduct of the parties and their wishes, using that phrase, "the best interests of the child," that is somewhat novel. Again, the Divorce Act, which we are not legislating here nor do we have the authority to do that, does not use the term "the best interests of the child." So the concept is novel and is now in legislation for the first time.

Mr. Renwick: What happens to all those strange presumptions that we were brought up on? The presumption in favour of the mother of a minor daughter, the presumption in favour of the mother of an infant son, until some mysterious age of seven or eight when the boy--

Mr. MacQuarrie: Children of tender years.

Mr. Renwick: Yes, children of tender years--probably when the boy was able to participate in hockey or something like, he should go to the father. There was also the presumption that the conduct question affected the suitability of the particular parent in relation to the custody. Are those presumptions all gone? I hope so, but are they? Are they ruled out now? Is a real effort being made? Is that part of what you are saying? Does this best interests delineation mean now it is an evidentiary matter as distinct from a

matter of a scarcity of evidence and a series of presumptions?

Mr. Shipley: The act specifically addresses the conduct factor and says that past conduct is not relevant.

Mr. Renwick: Yes, we will be coming to that. But it attempts to rule out the conduct?

Mr. Shipley: Yes.

Mr. Renwick: At least some aspects of it.

Mr. Shipley: We have a hard time addressing the tender years doctrine, because the judges have always said that is not a rule of law, but a rule of common sense. Legislating common sense is something we are not always able to accomplish.

Mr. Renwick: That is probably a philosophical concern, but it was triggered off, because I wouldn't want our witnesses here to somehow think that there has not been something valuable accomplished here. We are particularly pleased with the way the bill incorporates the principle of giving precedence to the best interests of the child over other considerations.

I take it this bill rules out something called "other considerations." Is that right? It is entirely in the best interests of the child. That is the test.

Mr. Shipley: Yes.

Mr. Renwick: I will not take up the time of the committee any longer on that.

Mr. Chairman: Are there any other comments or questions?

Mr. Renwick: The other area, Mr. Chairman, if I may, is I do not know how we cope with that question of the qualifications of the people to be the persons from among whom selection is made of those who will make the assessments. I appreciate the care with which that section of your brief has been drafted, so that you are not trying to create a monopoly in your own favour on that. I understand that, but I still don't know how we go about carrying it out.

I agree with you that, when the representative from the official guardian, assistant deputy official guardian, comes tomorrow, we may be able to get some clarification on that other question you raised with respect to whatever the section is that refers to the official guardian. I will not keep you on it, but there is a section with respect to the official guardian making a report--it is section 32, which provides for the investigation by the official guardian as an alternative to sections 30 and 31.

Mr. Chairman: Any other comments? Mr. MacQuarrie.

Mr. MacQuarrie: I notice this reference to technical or professional skills. I realize that social work (inaudible), and certain professional skills are imparted and acquired, but in

drawing a distinction between assessment proper and mediation, at first glance, it seems to me that a social worker might be more qualified to deal with the mediation aspects, looking at assessment. I know in instances where I have been involved, they usually look very strongly at child psychologists with qualifications as being able to assess the child from the point of view of academic levels of achievement, which parent is better able to satisfy the needs of the child, and this sort of thing.

I don't know. I am not trying to create any problems between professions, but it seems to me there are two different areas here, the assessment of the age of the child and the best interests of the child, and the mediation in terms of attempting to resolve differences between people with different claims in respect of the child. I was wondering if you can comment upon that from your perspective.

Mrs. Mann: I have no quarrel with what you are saying. Mediation does require a skill, however, in understanding what is happening in the family. It is not only settling a claim to a child. It is understanding the roots of the child, and the relationships in the family. The kind of things you were talking about in respect to an assessment have to be understood by the mediator in order to help the family.

It would be possible for two parents to mediate custody of a child, based on their needs, and come to an agreement about their needs, which have little or nothing to do with the needs of the child. So the mediator has to be skilled in understanding what the real needs of the child are in order to help the parents look at these and not only at their own needs.

Mr. Chairman: If there are no other comments, thank you very much for your presentation, which members can mark as exhibit 4.

We will be starting our clause by clause tomorrow at some point in the afternoon. I believe the only other comment I can make is that Metropolitan Toronto police are sending a written submission. There will be no oral presentation. We do not have it yet, but presumably we will have it in the morning. Then we will carry on tomorrow morning with the Canadian Bar Association, family law section, if we may. Again, thank you for appearing. We are adjourned until tomorrow at 10 o'clock.

The committee adjourned at 3:41 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BILL 125, CHILDREN'S LAW REFORM AMENDMENT ACT

WEDNESDAY, JANUARY 13, 1982

Morning Sitting



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Substitutions:

Hennesy, M (Fort William PC) for Mr. Andrewes
Kolyn, A. (Lakeshore PC) for Mr. Eaton

Clerk: Forsyth, S.

From the Ministry of the Attorney General:

Beecroft, D. A., Counsel, Policy Development Division
Shipley, A. Q., Counsel, Policy Development Division
Taylor, G., M.P.P., Parliamentary Assistant

Witnesses

From the Canadian Bar Association (Ontario Branch):
Davis, R., Member
Preston, R., Chairman

From the Official Guardians Office:

Glass, G.W., Q.C., Legal Services
Purvis, E.C., Q.C., Acting Deputy Official Guardian

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday, January 13, 1982

The committee met at 10:09 a.m. in committee room No. 1.

CHILDREN'S LAW REFORM AMENDMENT ACT
(continued)

Resuming the adjourned consideration of Bill 125, An Act to amend the Children's Law Reform Act.

Mr. Chairman: There is a quorum in place. Shall we commence with this morning's presentation of the Canadian Bar Association, Ontario branch, the family law section? Yesterday, you will recall, it was the wills and trusts section.

We have two gentlemen here, and I see three names: Preston, Davis and Epstein.

Clerk of the Committee: The first two names.

Mr. Chairman: Preston and Davis are here?

Mr. Preston: I am Mr. Preston and this is Mr. Davis, my deputy chairman. Mr. Epstein, unfortunately, had a commitment in court this morning and was unable to attend.

Mr. Chairman: Thank you. I will draw the members' attention to exhibit five, the Canadian Bar Association submission, which was delivered yesterday.

Is each of you going to be a spokesman, or one of you?

Mr. Preston: Mr. Chairman, we are each going to have separate areas of submission. I'll lead off, if I may.

First of all, I would like to apologize to the committee. When we prepared this brief we were dealing with a bill that had not been amended to pick up the Revised Statutes of Ontario number changes. I have undertaken that I will file an amended brief correcting all our numbers to make it a little easier for everybody to deal with it. What we are dealing with in our brief is the section numbers from the original bill, not as amended.

10:10 a.m.

We would first of all like to thank the committee for allowing us to make representations to it. Mr. Davis and I attended once before when Bill 140 was going through this procedure and we made certain representations, some of which were picked up in the new bill and some of which were not. We will deal with this as a totally new presentation, of course, but at some points we will highlight where we feel our representations were picked up.

We were somewhat concerned that a number of things we did

recommend were not picked up, however. When we last appeared I appeared in the clause-by-clause debates and was fortunate enough to have some input into them. None of the clause-by-clause changes that were made at that time were picked up in the new bill. It seems that we went back to square one, and, frankly, I couldn't understand that.

However, our point of view with regard to this bill is that it is an excellent piece of legislation and that it is dramatically needed in Ontario at this time, but we think there are a few more things that could be added to this bill to make it a much stronger piece of legislation. One of the more important areas we find should be dealt with and which we don't feel is dealt with strongly enough in the bill is that of access. Mr. Davis has some views on that, and I will ask him to put those forth at this time.

Mr. Davis: Mr. Chairman, the corollary to a custody case is clearly what the terms are going to be as far as the other parent's right to visit with the child is concerned. In my opinion and in the opinion of the committee, access is clearly given inadequate emphasis in this particular bill. There are many provisions relating to custody; there is an outline of what is expected of a custodial parent and what terms should be considered in deciding whether to award custody or not, but access is really not given any sort of priority. There is mention of it in section 27(5)--or in the numbering I have it is section 27(5). But it is my submission that the rights of the custodial parent have been dealt with adequately but not the rights of the noncustodial parent.

There is a great deal of literature on the subject of access. Some writers go so far as to say that access is the right of a child and that the courts and the Legislature shouldn't presume to deal with this as between the parents of the child but should take a look at it from the child's point of view.

I don't believe we can go so far; we're not skilled in that particular area. But in our respectful submission the Legislature should recognize that even in cases where parties separate, the input a parent has with respect to his or her child does continue and should continue. If at all possible the Legislature should get away from the winner-loser syndrome that you often find in a custody case. The unsuccessful claimant for custody is often shunted aside and simply told: "You can visit on every other weekend from Saturday to Sunday, but that's basically all the rights you have."

Section 27(5), which deals with what access means, does go a little way to say that included in the right of access is the right to make reasonable inquiries and to be given information about the health, education and welfare of the child, and that's an advance over the existing state of the law.

In our respectful submission one of the priorities of this bill should be to try to redress, if possible, the imbalance between access parents and custodial parents where that can be done, always, of course, in the best interests of the child. There are certain cases where parents are so intransigent and so committed to warring with each other that you are not going to be

able to get a reasonable amount of co-operation to achieve these ends. But in the overwhelming number of cases the access parent should have the right to know what is going on.

For instance, why should a husband not have the same right to medical information about his child as the custodial parent does? The medical profession will say, "We need authorization," and they want authorization from the custodial parent. As far as schools go there is no reason why a husband shouldn't know what his child's schooling is. Why should he have to battle with the authorities and battle with his wife to find out how his child is doing in the minds of the school authorities? Those are two of the more common examples in this area.

Our brief respectfully submits that the purpose section be amended to add a specific recognition or specific aim of the bill and to recognize that access parents continue to play a meaningful role in their children's upbringing after separation. To make such participation effective the submission asks that, in addition to the existing wording of "custody," "access" and "incidents of custody," the bill create a new reference to incidents of access, and under this section the courts would be enabled in particular circumstances to give specific direction to a parent or to an institution to outline just what a parent would be entitled to in any specific case.

In addition to that we would like to ask that the basic definition of or the basic reference to access be expanded. As it sits at present the only specific component of access that has been referred to in the bill is this right to make reasonable inquiries and be given information. Now, one assumes that the right to visitation is implied in the word "access," but there isn't any specific reference to that, and certainly the wider definition that we are seeking is not dealt with. We are asking that, as stated on page five of the brief, recommendation five, the definition section of access or the reference to access be reworded to read as follows:

"The entitlement of access to a child includes the right to visit with the child, be visited by the child, make reasonable inquiries, be given information from the custodial person or any other person or institution and, where possible, participate in decision making as to the health, education and welfare of the child and such other rights as may be ordered pursuant to section 28 as 'incidents of access.'"

I submit that the Legislature should remember that in a divorce situation or in a separation situation the child is not divorcing the parents. The parents may be divorcing themselves or separating themselves, but the tendency to award custody to one and vague access to the other, or access that is not well defined, is again a perpetuation of the winner-loser syndrome and adversely affects the access parent's relationship with the child in cases where the custodial parent takes the position, "I won; I was awarded custody. You lose."

The right to participate in decision-making is something that may be difficult in particular cases where the parties are intransigent. But when people are together they often have

differences of opinion: each spouse has a point of view that is expressed. It's quite reasonable to expect that even after separation the spouses may have differences of opinion, but to recognize the right to participate in the decision-making process, I submit, gives the access parent the role he is entitled to; he is still the parent of that child. The courts may determine that when having to choose between one home and another the one spouse is preferable, but that doesn't mean that input should be cut off.

The possibility that disagreements will occur is clearly there, but if the section we recommend is adopted it does not mean the access parent will be able to interfere unduly in the decision-making process, just that he will have some input into it. Where there is a dispute the courts in all likelihood are going to say that the custodial parent has the right to make the ultimate decision. But there certainly are cases, I submit, where the access parent's wishes may be just as valid and may be something that the court should continue, and perhaps in certain specific cases the court would see fit to order as incidents of access something that might more normally be considered custody.

The committee is aware of two specific cases, for instance, where a court, while granting custody to one spouse, made specific direction to allow the access spouse decision-making in a particular area. The one I am thinking of was a question of what educational regime the child should follow.

10:20 a.m.

That may be the practical application of some of these situations, but I submit that if there is reference to access, an emphasis or recognition that access is something that I submit is not recognized well enough in the legislation to date, we will be able to equalize to some extent the positions of parents in a separation situation without harming and, indeed, to benefit the children they continue to parent.

Those are my submissions on that one point. I am in your hands, Mr. Chairman, as to whether you wish to deal with specific questions in that area at this stage, or whether you would prefer to have Mr. Preston continue.

Mr. Chairman: Mr. Davis, perhaps the members will interrupt from time to time if they have a question or wish a clarification. I do know there is a little bit of confusion here over your referring to one of the old sections and it sets people scrambling for the new one. We do tend to lose some of your next sentence while we scramble. So maybe it will be worth while to take time over the old section and the new so that we start off together.

Mr. Preston: Perhaps I can help you, Mr. Chairman. While my friend was speaking I have dealt with the first six or seven pages and I can give you the changes in the numbers right now.

Starting on page three under the heading "Interpretation," section 25 is now section 18. Under the heading "Submissions," all references there to section 25 and its subsections are to section

18 and its subsections 18(1), 18(2), 18(3), as we go along. You can ignore our first submission as that has been picked up.

On the next page the reference to section 26 is section 19. Under "Custody and Access," the reference to section 31(2) is section 24. Under "Submissions," number two, the reference to 27(2) (b) is 20(2) (b). The same in three; 27(3) is 20(3).

On page five, section 27 is now section 20. Again under recommendation five, 27(5) is 20(5) and in the body of that, section 28 is now section 21. Recommendation six should be changed to 20(6). Recommendation seven should be changed to section 21 and again just a little further, four lines down, it is 21(1), (2) and (3).

On page six, recommendation eight, section 29 is now section 22. Under recommendation nine, section 29(2) is 22(2) and continuing down, recommendation 10, the two references to section 29 and the subsections are section 22 and the subsections. Under recommendation 11, section 31(1) is now 24(1) and, of course, 31(2) is now 24(2). Under number 12, section 31(2) is 24(2) and again under recommendation 13, the same change.

On page seven, recommendation 14 should refer to section 25, not 32. In recommendation 15, 33 has become 26 and again further in that paragraph. In recommendation 16, section 34 has become 27, and under 17, section 80 has become 75 and 35 has become 28. That is as far as I have got but I think I can continue along as we go.

I would point out that the members of the committee of the family law subsection are all family practitioners. We have approached this bill as family practitioners. We have looked at it as to the problems we encounter in this kind of practice. Family law practitioners' most difficult cases right throughout the piece are the custody cases.

We know what problems we have with custody cases, we feel we know what problems the judges have with custody cases, and that is the thrust of our approach. We have approached this bill as to what would enable custody actions to proceed more smoothly and what should be clarified from the point of view of family law practitioners in custody actions. That is the approach that is taken throughout this bill.

Perhaps the only areas of the bill where that approach has not been taken are in the guardianship sections and we understand the wills and trusts subsection has filed a brief. I have not had an opportunity to look at it in detail, but certainly that is an area in which they are very well versed. We have not approached that because it is a little different thrust.

We do feel, however, that a number of items in this bill that are to be commended include at least a start at representation of children. We will have some further submissions on that later, but it is a coming trend in family law practice, especially in custody matters.

We also feel the mediation provisions are extremely valuable.

It is something that is being done in the practice now on an ad hoc basis and to find some legislative support for it is very valuable to us.

Proceeding with the brief as it is presented, in order, we feel the bill does not contain sufficient definitions to assist the court or the practitioners in understanding the terms of the bill. This is dealt with on page three of our brief. The definitions section of the bill is section 18. It merely contains three definitions but is very essential, especially considering the problems that may occur as far as the provincial court family division is concerned because of the Supreme Court case that is coming up. There is a case in the Supreme Court from British Columbia that may throw the whole validity of provincial court orders into chaos, but that will have to be covered when the decision comes down.

We feel there should be additional definitions in this bill itself. Our view is that any piece of legislation should stand as far as possible on its own. You should not have to have cross references to other pieces of legislation for definitions.

One of our recommendations which we made before the previous committee was that there be a definition of separation agreement in this bill. There are places in the bill that separation agreements are referred to. The separation agreement in common law can mean any number of things. It is specifically defined in the Family Law Reform Act. We feel it should also be specifically defined in this act. When we previously appeared, the comment was made, "You can always refer to the Family Law Reform Act," and generally speaking the Family Law Reform Act cases would go hand in hand.

We envision cases where custody only is in dispute and where no claims under the Family Law Reform Act will be put forth in any action. We do not feel, therefore, you should have to refer to another act in that particular action. You should know what a separation agreement means in this bill. It would merely require extracting the definition from the Family Law Reform Act and putting it in here with some minor variations. We do not feel that would be too difficult but we do feel from a practitioner's point of view it would be very valuable.

We also feel that "child" should be specifically defined in this bill. This is a bill that is aimed at children and there are a number of provisions in the proposed act that somehow impinge upon the definition of "child" but it is never put together in one place. So our third submission is that "child" should be defined. We would suggest that it be defined as set out in our brief. This is again partly lifted from the definition in the Family Law Reform Act and partly an adoption of what is necessary for this bill.

The references to the Child Welfare Act are for the adoption and child welfare situations. If the child is under a Child Welfare Act application then it is not involved with this act.

A child should be a minor and what we have done is taken it out of section 20(6) and put it in the definition section. I do not know why a restrictive term should be in section 20(6) and not in

an actual definition. You have to go to various areas of the bill to find out what a child is. Why not tell us what a child is right off the bat so we know what we are at when we start?

10:30 a.m.

We think separation agreements are very valuable tools in family law practice. Litigation is so incredibly expensive these days that it should and could be avoided at all costs. Part of the way you avoid litigation is to encourage separation agreements, and throughout the bill we have attempted to strengthen the provisions in the bill that deal with separation agreements. Separation agreements were a very strong factor in the Family Law Reform Act. They were encouraged, they were dealt with very strongly and we feel they can be dealt with equally in this bill dealing with custody and access.

On page four in our brief, under the "Custody and Access" headings in the bill which start at section 20--Mr. Davis, of course, has dealt with the access provision--we have made the recommendation that the corollary to incidents of custody, which already appears in the bill, is incidents of access and we don't find a distinction between the two terms. If there are incidents of custody, there are incidents of access. We feel that every time the term "incidents of custody" appears in the bill, incidents of access should appear to allow a judge to say, "Yes, you have a right to visit, and the terms of those rights are something called incidents of access."

It may be that you must visit the child under some kind of supervision, because you have had a problem with the child or you have caused problems for the child. It may be that you are allowed to take your child to a particular church. That may be an incident of access. We feel very strongly that the term should be included to give effect to what Mr. Davis has said, the corollary to custody is access. Don't shunt the access parent aside, give him the rights, and this bill can be used to do that. That would give the courts the ability to deal with the various bundles of rights that come under access.

We first approached Bill 140 with the suggestion that you define these things, but after the clause-by-clause presentations we came down to the position that it would be impossible to define it because every time you came up with one thing, then there is one other thing. Leave it for the courts to define, but give us a broad term. Incidents of custody are not determined, neither should incidents of access be defined.

We feel so far as section 20(2)(b) is concerned that there should be a change in merely the way that is presented. It says, "the right to direct the education and moral and religious training of the child." That can be read in a number of ways. Is it education and moral and religion? Are you equating moral and religious? We think a change should be made to make it clear that they are mutually exclusive, that each is an element in itself; education, moral and religious are all separate elements.

In addition, when we last presented our brief there was a

brief--I don't know whether there was this time--from the native rights people and one of their recommendations was that in this section the word "cultural" should appear. We thought that was a very valuable recommendation. It certainly isn't our original suggestion, but we have adopted that. We feel that the custodial parent does have the right to also deal with the cultural aspects of the training of the child. So our recommendation is, "the right to direct the education, moral, cultural and religious training of the child," all separate aspects.

I won't propose to extend our presentation to go through every recommendation we have made. I intend only to highlight it as much as possible so that you can follow through. I think the changes we have are self-explanatory.

The change in section 20(4), although I won't deal with it specifically, we feel would create a kidnapping problem; the single most serious problem in custody cases--kidnapping is perhaps a criminal word, it is improper, but abduction, scooping or whatever. The problem you have in a custody case is when parties separate and one party or the other takes the child. You have a hiatus period where both parties have custodial rights and there is a tendency of the parents to try to get the upper hand by grabbing the children back and forth before there is a court order. We want to avoid that if at all possible.

In our view the section in the bill leaves it open in the way that it is drafted so that each parent would still be able to take the child back and forth until there is a court order. We have redrafted the section to indicate that once the child has moved, that's it without a specific agreement or a without a court order. In other words, there is always going to be the first taking of the child, but let's end it at that point until it can be dealt with in a rational fashion either by the courts or by the parties entering into a separation agreement.

We feel that although section 20(4) was trying to do that, we did not feel that in our reading of it that it carried through in that attempt. We feel we have suggested a redraft that may well cover off that point.

Our fifth recommendation, of course, has been covered by Mr. Davis. As far as separation agreements are concerned under section 7, we also feel that section 21 should be expanded to specifically provide that separation agreements are an approved way of going about custody things. Section 21 is a very crucial section to the bill. That is what gives the courts the power, and that is what tells the parties what they can do. We feel section 21 should be in three subsections, as we have recommended, and that one of those should say that they can enter into a separation agreement providing for custody, access, incidents of custody or incidents of access. This leaves it open to the people to deal with it on a separation agreement basis.

A very serious problem today in custody and access cases is the interjurisdictional problem, the children who are being taken to England, British Columbia or the United States, and what you can do. This bill deals with it in detail by dealing with the Hague

convention and we will get into that later in our presentation. But some of the recommendations we have dealt with in sections 22, 23, 24, 25, et cetera, deal with how to protect those interests and how to govern which court has jurisdiction. We will deal with that in more detail.

We view section 24 as an attempt at defining really what the best interests of the child are. It doesn't say it is a definition, but that is the effect of the section. The courts and common law have always had jurisdiction based on the best interests of the child. This is a very valuable section to add to the bill and it is an essential section of the bill because everything in the bill is dealt with on the best interests of the child.

But this particular section doesn't start where we think it should start, which is to deal with the child itself. It is all directed in other directions, the economic aspects. It doesn't deal with the child as a person.

In our recommendation 12 on page six we say that the very first section should be that you should refer to the physical, psychological and social needs of the child. This directs best interest at the child as it exists as a person and not at these other things, the time he has lived somewhere else and the economics and proposed plans of third parties. Let's look at the child first.

Mr. MacQuarrie: How about educational?

Mr. Preston: Educational? I don't have any objections to it, but that would be better dealt with as a subsection. I think "social" would also cover educational.

Mr. Mitchell: Do you not really cover that somewhat earlier in the comments made by Mr. Davis?

Mr. Preston: Mr. Davis was dealing specifically with access, but this section 24(2) tells the court what factors it considers when it is assessing best interest of the child. We say the single biggest factor must be the child as it exists as a person, not where he or she is living, but let's assess what the child is and then look at how these other factors impinge on that child.

10:40 a.m.

Mr. Preston: We feel that if you say, in determining the best interests of the child, that the first things you look at are the physical, psychological and social needs of that child we are dealing with, then you can go on to say, "and those circumstances are (a), (b), (c), (d), (e)," and we have some specific changes that we recommend to those.

We have suggested a change to subsection (d), for instance. Subsection (d) was trying to get at what we have suggested, and we just say that if subsection (d) refers back to the (a) we have recommended, the physical, psychological and social needs, then the court says, "What is the capacity of each person applying for

custody to deal with those particular needs of the child as they find it?" we find that that would better enable us, in reading the act, to approach the case, and we are also of the opinion that it would assist the judges.

We also had some other minor changes to section 24. Section 24(2)(a)(ii) says "who reside with the child." Why is it not important that the nonresident members of the family be dealt with or considered as well? Why is it so essential that you limit it to the child's family who reside with the child? There may be brothers and sisters in the same town who do not reside with the child, who might have some relation to one of the applying parents, and that may be very important. The grandparents may not live there, but they may have a big impact on that child's life, and they may be a factor. We think it is too limiting to put in the words "who reside with the child."

Again, in subsection (f), we feel that the words "home as a" restrict this subsection. We think this section should more appropriately be worded, "the permanence and stability of any proposed custodial family unit." What is a proposed custodial home? Is that the physical home, or is that the emotional home? What is it? If you take the words "home as a" out, we think the section would be more clear--"the permanence and stability of any proposed custodial family unit." If there is a boyfriend coming along and it is proposed that they are going to get married, is that "family unit" appropriate?

We also are not enamoured of subsection (g), the blood relationship situation. We feel that in today's society relationships are not always determined by blood.

Mr. Davis: They have amended it.

Mr. Preston: I am sorry. Mr. Davis has pointed out that you have amended (g), and on my quick reading of (g) the amendment would be acceptable. You have made important "blood or adoption order or anybody who is a party to the application," so I guess we can amend our recommendation.

I seem to be going on a little too long, and perhaps I can shorten somewhat our recommendation 15. Custody actions tend to drag on and on and on. If you get an interim order for custody, the best thing you can do so far as your client is concerned is to sit on the file because once you have got an interim order for custody your client has the children with him or her, and the courts tend to say, if a year later the children are doing all right, that they will not change it.

Interjection.

Mr. Preston: It is not only that. If you do nothing, it does not cost your client anything, but they already have a leg up in the action, and the longer the children are okay in a given environment, the less likely the courts are to interfere with it when it finally comes to the trial. So from the point of view of the person who has got a leg up in the action, they will delay the action if at all possible. They will not bring applications; they

will just sit on it. It is an adversarial situation; however, there are abuses.

Section 26 is an attempt to say in custody actions, "Let's get it on, let's get the full hearing." An interim application is done on affidavits. The parties are not heard from except in writing, so their credibility may not be an issue and a full view may not have been given to the court. This section is a good provision in that it requires these actions to be moved on, but we want to extend it a little bit further. We do not think that a mandatory six-month period should be in there. We think that either side, if they feel there is a delay, can make an application to have the matter brought on. I will not go into how our recommendation 15 works. We think it is good, but we think it can be made better and more flexible.

Mr. Davis: One other thing that occurred after this section was drafted was that a presentation was made by the unified family court at present operating out of Hamilton. They have another system which would possibly work, if we ever get a unified family court provincewide. It is perhaps more complex and something that cannot be dealt with by legislation other than by encouragement, but in Hamilton the court never loses sight of any particular file. If you bring an interim application, a decision may be made at that point, but the file is never adjourned without a fixed date. You have to come back after you take the next step. In that case the court monitors each and every step of the application, and they do not have the type of delays that we have here.

I think the attempt to put a six-month limit on it is a recognition of the fact that delays can hurt one litigant or the other, but another matter that I think can perhaps be done by way of regulation, that ought to be encouraged if at all possible, would be this kind of court monitoring system. We are pretty sure unified family courts are quite a distance away, given the constitutional problems and everything else that comes with it, but this is another way of dealing with this particular problem.

Mr. G. W. Taylor: Excuse me. Does section 26 not deal with that when you have the six-month feature in there? It is the court that is taking the initiative, and I recognize that, yes, six months in the life of a child may be long. Sometimes six months in the life of an adult is minimal, in the activities of a lawyer, infinitesimal.

We are allowing in this section some action, one by the court if the parties have commenced the action, and you know it is a two-tiered situation. You have extraprovincial orders where we have some presumption that they are in order and will be acted upon. Then there are the ones on which you are going to make a new application, and the new application deals with coming on for trial or for an interim possibility. I think the six months--and advisers have said this is their experience--is a good halfway place to say, "Hey, get on with it," because you have certain features, or you have a person with a problem.

They go the lawyer to prepare the papers, and depending on

how quickly you work, you have one, two or three weeks. And there are the notice applications that have to go out. So, you are trying to define a time period that will make those applicants work, and six months was considered a very good time frame, particularly considering court calendars and all those other features.

That does not prevent a lawyer from seeking, during that six-month period, an earlier date, putting some onus upon the applicants or their lawyers to bring that six-month period up. Otherwise, the court will insert itself and say, "Get on with that action." That is why the six months was chosen, and you will find that there are many lawyers in this group here who all know how quickly six months passes on the files on your desk. I can see that as being a very short period as compared to some of our other statutes.

Could you comment on that? I think the reason behind it is, this is the clerk doing it, giving a date, citing a date, saying, "It is on, it is go."

Mr. Davis: But in addition to that you may want to make specific allowance for one or the other of the parties' lawyers to bring it on earlier. So, the specific section is there saying, "In addition to being reviewed at six months, you may bring an application for directions at any time when the case is ready."

Mr. G. W. Taylor: But it is within the rules and the ability of the practitioners and lawyers today to do that, just in your general practice under the procedure that is available. Is that not possible? I do not think the law has changed that much since I was practising.

Mr. Preston: That certainly is possible. The problem we envision is that this bill contains provisions for mediation and assessments, and they often take longer than six months. If you combine section 26 with an automatic court review, with assessments and mediations and other factors, are you creating an additional burden on the court to bring things up, an additional appearance in court by the lawyers, which is incredibly costly to the litigants?

10:50 a.m.

What we have suggested is that in view of that, you do not make it an automatic thing on the six months but, in addition, that you can provide that there is a written request and perhaps at the first appearance the judge can say, "All right, if there is a mediation," then he can set a period other than six months.

Perhaps our brief is not clear, but if you just have it coming up at six months and a month before the six-month period a mediation was ordered, then the lawyers have to go back, as the clerk said, "Here is the automatic six-month situation." They have to go back to the court and say to the court at that point, "Six months is not appropriate because you have already ordered a mediation."

What you want to avoid in this day and age, I think, is a multiplicity of court appearances on the part of anybody. The cost

to litigants, especially in family law, is astronomical because it is all coming out of the same pot anyway. There is no insurance company paying for it. There is no big company paying for it. It is all coming out of one little pot and it is being split up.

If you can find some vehicle that moves the cases along but prevents automatic court appearances unnecessarily, then you are getting somewhere to the ideal. Frankly, I do not know what the ideal is but--

Mr. Spensieri: Are you not saying that six months is often too soon simply because the reports are not ready and it only results in another adjournment anyway, so why would you--

Mr. Preston: It is entirely possible.

Mr. Spensieri: --be wanting to have an even earlier review period.

Mr. Preston: Every custody case goes at its own pace. Sometimes they are battling tooth and nail and you are in court every week. Sometimes you go and have two parties that both think they are right but are acting like adults and agree to an assessment. They run at a different pace.

Six months is an arbitrary figure. I do not know where six months comes from. It is not a bad figure, but it is arbitrary because it bears no relationship, I find, to how the case goes. For instance, the official guardian's report; If you have real problems, and I will get to the official guardian's recommendation, it sometimes takes an incredible amount of time.

Mr. Spensieri: So about 70 per cent of the time you would just be sending someone done at the six months and getting an adjournment anyway.

Mr. Preston: I would think that is a very serious factor.

Mr. G. W. Taylor: You started off saying that I, as a litigant for my client, would get my interim order and sit on it. This is put in there to prevent that. Also, if you go down the other routes, the court is aware of the other routes you might take--mediation, the official guardian assessments--so the court is aware of all those.

This is to make sure, in the best interests of the child, that it happens quickly and make that definitive answer that the child is awaiting and the parents also. If you put anything longer than six months, I am fully aware that there will be times when the mediation will not be done and an official guardian report might not be up, lawyers will be on vacation, any number of excuses that there might be some delays.

But this is put in there to make everybody move quickly. Yes, it is an arbitrary date. You could put a year; that is an arbitrary date, or nine months. All of them are arbitrary. But this is to make all of the participants, the parents and those people who are servicing the court or the parents or the lawyers with the

necessary information for the court to make that decision, hustle their butt and--

Mr. Preston: I understand that.

Mr. G. W. Taylor: --get that information in there so the judge may make the assessment.

I feel that six months is a period that makes everybody move along and get it done. I have difficulty with your argument: "I have got my interim order. I am going to sit there."

Mr. Preston: Our recommendation would allow the other side to say: "You are sitting on it. You are the petitioner. You have the interim order." The plaintiff for the petitioner runs the cases. Those people who set the actions down for trial or pass the records, it is their responsibility. What we are saying is, if I am the respondent, I can by written request ask the matter to be listed and then this comes into effect.

If we have two family law practitioners who are dealing on an equal basis and both interested in moving the matter along, then they know and move it along in tandem, and it moves along in the proper order. If we have one side that is delaying for any particular reason, if it accepts our recommendation, the other side can make a written request and the court will move it along.

That is really the thrust of our argument. It is still an adversary system, but let us let the adversaries move the case along. Here is an additional vehicle that allows one of the parties to ask the court to move it along.

Mr. Spensieri: I can see that is particularly beneficial where you have an unrepresented respondent. Are you contemplating a very simple court case?

Mr. Preston: If you have an uncontested case, you do not have any worries.

Mr. Spensieri: I meant unrepresented where you have a very simple forum to permit--a lot of these cases are going unrepresented these days. I could see your point if you were arguing for a very simple, self-help kind of written request by a respondent who does not happen to have a lawyer to move things along. I could see the benefit there.

Mr. Preston: Perhaps a compromise is indicated. Often you have an interim thing or you have an interim order or you have at least some kind of first appearance in court. If you have that, the judge should perhaps be able to vary the six-month date to the needs of the particular case. But section 26(1) as worded said the clerk of the court shall list the application. They have to do it no matter what else has gone on in that action.

In any event, perhaps we should move on to the next--

Mr. G. W. Taylor: Before you move on, because this is a very pertinent part, section 26(2) says after it is "listed by the

clerk or registrar in accordance with subsection 1, the court by order may fix a date for the hearing of the application." So you have an opportunity at that time for the court to make the assessment as to what the applicants are doing out there, their solicitors or the support staff who are supplying information. If it is felt that the best interests of the child are served if the situation is investigated, there is a culmination and an order made quickly.

The six months is really to make all those participants--as Mr. Spensieri has indicated, some may not be represented. There may be some delays, be it solicitor delays, be it just the system itself slowing down. This is to keep track of all of those by the court where it has been filed, to make everybody move along and to make them come to a decision.

The court is pressuring them into it. They are keeping track of it. You have made the application to the court. Where there are participants, it can be looked after. There is no difficulty in you phoning the solicitor on the other side, making your interim application or request to delay because this is going on.

I recognize it is another appearance, but for all those participants where only one side may be represented, it was felt that the decision, once you have gone to the court, to make the court responsible to move that action along--and heaven knows, we have enough complaints about delays in the court system and this may cause enormous problems for the court; we recognize that--is one that keeps everybody for the best interests of that child.

Mr. Preston: I can view this as causing more delays. We have no judges half the time in the family law area now. There is an incredible difficulty in obtaining judges. There are only two family law commissioners. It takes six weeks to get the first appointment date. Even in urgent matters, it sometimes takes days. If you add all of these additional elements automatically to the court's docket, I do not know how they are ever going to deal with the volume.

I heard a statistic the other day that 25 per cent of the Supreme Court's time is being taken up with family law matters. There are some weeks when there is not a Supreme Court judge hearing family law matters. If there were a lot more judges, maybe this will work. But if it is just automatically coming up in all these cases, and custody cases most often take over six months, you are just adding extra motions to the court dockets, perhaps in some cases necessarily, but perhaps in other cases unnecessarily.

If the section is rethought and you say, "Fine, if there is an earlier court appearance, the judge may ask that it be brought back in six months," then it is automatically listed and brought back, that may get around that problem if the judge has already indicated it.

But to have every case automatically come up in six months to the court may put a burden on the court, because automatically then you have two lawyers there burdening the court time. How do they schedule it? When the clerk lists it, then I get a notice and I

have to appear. If I am on some other trial, I send my student to say I cannot be there. Then it is adjourned to another date and then there is another notice. I think there has to be some flexibility in this section. The section is good but I think there has to be more flexibility built into it.

11 a.m.

Section 27 of the bill is a similar section to that which appeared in the Family Law Reform Act because of the paramountcy of the federal jurisdiction of divorce. The problem we have is it says if there is a divorce action commenced, any application under this part grinds to a halt unless there is leave from the court. We do not think that is appropriate if it is merely a divorce action and does not deal with custody.

If you have an application going under this act for custody, you are acting for parties and you say, "Let's leave the custody matter to be tried separately and get the divorce out of the way," and you can do that. Why should you have to go to court to bring an application to continue under the Family Law Reform Act if there are no claims in the divorce for custody? A minor amendment to this would indicate, if there is a claim for custody under the federal Divorce Act and this application stops except by leave of the court, then you have covered that situation.

Mr. Spensieri: I see your comment as a theoretical point but now many divorce proceedings have you commenced where you do not ask for ancillary benefits?

Mr. Preston: In my practice, if I have a custody action that has been going for a period of time and it is decided to bring a divorce action, I run them parallel. I do not take the time to put them all together.

Mr. Spensieri: But assuming there was no pre-existing application?

Mr. Preston: You make your election as to whether you are going under a divorce. Sometimes you do not have grounds for a divorce and sometimes you only have grounds for your custody action. You just bring your custody action under this bill or your family law reform action. If it has been going on for six or eight months and all of a sudden one of the parties moves in with a boyfriend, and then you have grounds for divorce and adultery, you do not want to go back to square one in the action.

We do not feel it will cause any abuses. We are just saying that, if there is a Divorce Act application going on and it is merely asking for a divorce and no relief under this bill, why should your application under this bill grind to a halt until you go to the court to get approval which is going to be rubber stamped anyway.

Mr. Spensieri: So it is only for those pre-existing files--

Mr. Preston: Sure.

Mr. G. W. Taylor: Mr. Preston, before you continue, I would like to ask you one question. Without being pejorative to the legal profession, there are always legal gymnastics at different times. My mind does not fail me that much that with the numerous divisions of custody and matrimonial and family situations and the numerous courts--one could go to from the surrogate court to the Supreme Court to the family court--with this section in there, can you see it--and I ask you in a general way, drawing on your experience--as a method of staying a family court situation where you know your best results and all those features are taking place in a family court?

You have gone along, there is a date set, you have done some mediation, some expert help has gone in, so you are really just about ready for the hearing. Then in on the different desk because the other solicitor has come up with a neat little ploy and has dropped the divorce action with custody in there or maybe without custody, you now have just what we are trying to do, serve the best interests of that child and now, because the litigant may foresee something that is not in that litigant's best interest that he or she believes for the child, you have a delay situation.

I think it is still possible now even without this act to bring about delays. What is your experience in the profession? Are they using this ploy to delay family matters now in the courts and would this create a problem, although we have the qualification except by leave of the court, so you have to go back to the family court to continue? Can you foresee and has your group foreseen problems with that section? It is one that you obviously have to insert in some form or manner in this section.

Mr. Preston: You have to have it because of the paramountcy of the Divorce Act. You cannot have two actions for custody going without one of them being paramount. I have not experienced abuses. I am aware they are possible but I certainly have not found them. Generally speaking, in an action for custody, the practitioners move it along and they do not try those kinds of ploys, clearly because you can get some kind of protection from the court. The court will put the two actions together in order to expedite them and move them along if they find that kind of abuse. It is there, but I do not find it being abused. Have you found that, Ross?

Mr. Davis: If it is a blatant attempt to try to judge-shop, then the authority that is granting leave is clearly going to put a stop to that, and say, "You are simply doing this as a device." I suppose someone who is being creative about it could say, "We are here in the family court, but there is some property we cannot decide. We do not know who is going to get the family couch, and then there is this other problem. Maybe we should not be in this court at all." They have interim custody so they say, "Let's go to the Supreme Court and have this whole thing decided." You are going to be able to engineer a delay just by taking that step and it may not be seen as an attempt to avoid a judge, but you may be stretching out the period of interim custody.

It may be this particular amendment will not absolutely

prevent that sort of thing, but in Mr. Preston's case it would allow the two things to go parallel without having to worry about getting leave. I think the courts and the masters and judges involved are wary of that type of thing, but it could be a problem. I don't exactly know how you get around it.

Mr. G. W. Taylor: To get back to my earlier comments, where the statute for the family law system has been built with some efficiency, as much as can be built into a family law system, this one allows that quicker determination to be thwarted by dropping another application on or instituting another action.

Mr. Davis: It has been done but I don't know how to get around it. You can't avoid the effect of the Divorce Act unless they transfer that jurisdiction to the province at some time in the future, in which case you will not have the problem any more.

Mr. Preston: I think our amendment just makes it less able to be abused, because the divorce action would have to contain a claim for custody to stop the other custody action. If you just start a divorce, it stops automatically even though the two claims are not related. Our recommendation merely says, "Let's make sure the same things are being claimed before you stop the action that is already going." I think that is the best I can do. Is there anything else on that point?

Mr. G. W. Taylor: No.

Mr. Preston: Under the custody access orders heading, section 28 contains the powers of the court, but if you go to the back of the bill to section 75, it contains an additional power of the court and that is the power to make interim orders. We could not see why you would not put the power to make interim orders right in the powers section. It does not make sense to have it in two different parts of the bill. There may be a reason, but it was beyond me in any event.

Mr. Chairman: Excuse me, may I break in at this point, Mr. Preston? Yesterday Mr. Renwick, in particular, had questions of the official guardian's office and we requested that the official guardian be here. It has been arranged for Mrs. Purvis, the acting deputy official guardian, to assist us. She was due at 11 and rather than cut you short, could we perhaps hear from her at the same time as we are hearing from you and deal with this at the same time? Then when the members have finished with Mrs. Purvis, as the case may be, we will carry on with the non-official-guardian matters with you.

Mr. Preston: Certainly. I appreciate having Mrs. Purvis here and I think this is a very good way of dealing with it. First of all, perhaps Mr. Davis can give you the changes in the numbers to our brief.

Mr. Chairman: We are at the very top of page eight.

Mr. Davis: That's correct. In the first line, 37 changes to 30, 41 is now 34

11:10 a.m.

Mr. Renwick: Where are we?

Mr. Davis: Page eight, the first line.

Mr. MacQuarrie: Section 41 is what?

Mr. Davis: Section 34.

Mr. Renwick: Section 37 is 30.

Mr. Davis: That is in the fifth line. The next change is under submission 1, 39 becomes 32.

Mr. G. W. Taylor: For the assistance of those members with this brief, a rough rule is if you subtract seven you get the correct numbers from the brief by the Canadian Bar Association, family law section.

Mr. Davis: That is the case all the way through.

Mr. G. W. Taylor: No, the later ones with the very high numbers do not work on sevens.

Mr. Preston: Where you added things.

Mr. Davis: Perhaps, rather than go through each one subtracting seven--

Mr. Chairman: I am not sure Mr. Taylor wished to shake you off. He was just giving a rule of thumb to the members. Carry on, if you would, at least to the end of the official guardian's part, with these section amendments.

Mr. Davis: In the first line of page nine, section 39(1) becomes 32. Under the heading "Custody and Access--Enforcement" in the third line, 44 becomes 37. About eight lines down, 44(2)(b) becomes 37(2)(b). In the second last line, 44(6) becomes 37(6). In the first line on page 10, 44 becomes 37. In the second line of the next paragraph, section 47 is 40, with the same change in the second line. Those are all the changes on that page. On page 11, 44 in the first line becomes 37, with the same change in the second line. Section 46 becomes 39. Section 47 becomes 40. In submission six, section 44 becomes 37. In submission seven, 47 becomes 40.

Mr. Chairman: Thank you. Mr. Renwick, how do you wish to handle it? Do you wish the Canadian Bar Association to carry on with the brief and you will then intersperse it with, perhaps, questions of Mrs. Purvis and/or the CBA people?

Mr. Renwick: All right.

Mr. Chairman: Fine. Would you carry on, then?

Mr. Preston: First of all, Bill 140 moved the official guardian's powers for reports from the Matrimonial Causes Act into

this act and we essentially liked that approach. We made certain recommendations as to the terms of it, but we liked that approach. We felt the official guardian's powers of reporting should be dealt with where they are most often needed if the Matrimonial Causes Act was being repealed.

When this bill came out, that had been changed around. Some of what we had recommended was put in this bill, but now you have to look at this bill for the official guardian's report and then go back to the Matrimonial Causes Act to see what the effect of it was. I am not sure, from looking at the new one, whether that has been reversed again. Just give me a quick second. That is right. Section 32 specifically talks about the official guardian's report. Bill 140, as it was constituted, was a lengthy section, it was section 39 in that bill. It was 11 sections long and it took everything that was in the Matrimonial Causes Act and put it all together in one place, so you did not have any references back and forth to various acts.

We found that an appropriate way of dealing with the matter and we do not know why it was reversed when this bill was brought out. We think that all the official guardian's rules, as far as official guardian's reports are concerned, should take place in this bill. I do not know what Mrs. Purvis's comments on that are. Maybe it doesn't make any difference. If we are dealing with something, I do not want to have three volumes of the Revised Statutes of Ontario on my desk. I just want one. It is quite simple from our point of view, but there may be a perfectly valid reason.

We are also of the position that the official guardian's office is a very valuable office to Ontario. It performs a great variety of roles. Where I run into the official guardian's office most, of course, in family law, is in custody and access problems. For the nonpractitioners, if you have a divorce, for instance, as soon as a petition for divorce is issued in which there is a child under the age of 16--there is an extended definition, but I will deal with that for now--you must serve the official guardian's office and it becomes involved with its particular rules. That is not if there is custody claimed or access claimed, that is if there is a child under the age of 16, whether the child is part of the divorce application or not.

The official guardian's office then sends out a questionnaire to everybody--you can correct me if I am wrong on the procedure. The questionnaire sometimes comes back and sometimes does not come back and there are more letters following up and more postage at 30 cents a letter, and it slows down the action. If I have a divorce and the parties have entered into a separation agreement that has resolved custody, and I am merely claiming for a divorce, no claims under anything but the divorce, my action for divorce is bogged down waiting for the official guardian to send out the questionnaires, to get the questionnaires back and to file a one-line report saying there are no difficulties regarding custody, if that is the situation, and that is generally the situation in those kinds of matters. It is not the fault of the official guardian's office except that it does not have enough bodies and people, as I understand it, to deal with these things quickly, and people don't answer these questionnaires half the time.

We think, if custody is in issue, the official guardian should be involved. If custody is not in issue, we appreciate the official guardian is the provincially appointed watchdog, but I don't think it has the bodies or the means to give effective input into that, and you end up with delays in your uncontested divorces, and that is the first approach to our bill. Perhaps it might be appropriate for Mrs. Purvis to comment on that approach.

Mrs. Purvis: I had better start back on your comments about the earlier bill, and why it was worded the way it was. I think if you read further you will see there are complications there that were not in the previous Matrimonial Causes Act. It allows a judge to dispense with our report. It became just impossible, from an administrative point, to handle feasibly, and it would almost lead to more expense in the long run if we follow it through later. We felt it was better just to leave the Matrimonial Causes Act as it is, with no changes.

I cannot really go into your point about not wanting the reports. Mr. Perry has placed our position before the Attorney General (Mr. McMurtry) and has approved the present form, and I don't feel it is appropriate to go back into that. I have not been involved with him closely in the amendments and I am not able to comment.

Mr. Preston: If I can just briefly respond to that, it struck me on the first reading that putting it back in the Matrimonial Causes Act was making an attempt to say: "Fine, here is what you have got. Let's not monkey with the official guardian." Bill 140 did provide some changes that were good for the official guardian procedure, and it almost appeared to us to say: "Let's not mess with that and we will not have to go and amend the Matrimonial Causes Act. Let's deal with that later." We think now is the time to deal with it, and the function should be dealt with appropriately.

I happen to believe that, from a practice point of view, a judge should be able to dispense with the official guardian's report if he or she deems it appropriate. It is the judge who has to decide the case; it is the judge who reads the official guardian's report and is most influenced by it.

I will be very frank with you that, in dealing with official guardian's reports, I have had a great deal of difficulty with the reports that are filed because of the amount of hearsay they contain. The official guardian's report in a contested action, if there is a detailed report found and filed, contains evidence that could never be brought forth in court. It is a way of getting evidence in that should never be there.

I appreciate it is very difficult for a case worker to go out and interview a woman or a man in the home and present a report that does not deal with some hearsay. But these reports often come back and what is right on the face of the report, what the judges read, is that this woman says her husband has abused her, has beaten her up and never gives her any money. It gives her view--

Mr. Mitchell: Who is that? Margaret?

11:20 a.m.

Mr. Preston: Possibly, but it gives the party's view through the mouth of a case worker in a document that is always read by the judge and that will give the judge a colouring. Surely the judge should only have the evidence that is properly admissible before him. This we find is a defect in the official guardian's report that we should try and get around.

Mrs. Purvis: You must realize, though, that is (inaudible) that causes that.

Mr. Preston: That is why we want it changed.

Mrs. Purvis: And the case law as it stands.

Mr. Preston: But it is provided for. What I don't understand is, when you have rules of evidence, how through filing a report we can get around the rules of evidence. Rightly so in many cases the judge puts a great deal of emphasis on the official guardian's report. If the official guardian's report came out making recommendations and put it in a language that says, "We have interviewed all the parties, and our case worker's qualifications are X, Y and Z, and based on those interviews we have the following recommendations," we don't object to it.

But what the official guardian's report says is, "The case worker attended at the premises of So-and-so and So-and-so and was told the following history." Then you have three and four pages of what one of the parties thinks about the other side. That is not subject to cross-examination. It is not subject to any kind of testing. It goes to the judge before he hears the evidence. He already might have a predisposition to deciding that case in one fashion from seeing the official guardian's report without any possibility of cross-examining.

There is only one provision you can do; you can dispute the official guardian's report and that never works.

Mr. G. W. Taylor: It is in the Matrimonial Causes Act that it allows you, because before the judge sees the official guardian's report, if the practice is still the same, it is filed with the court, it sits in the court file, the judge hasn't seen it prior to the hearing and if there is any material in there at that time that you as the solicitor for one of the applicants disagrees with, you can then put your dispute features in, which is at present provided for in the Matrimonial Causes Act.

Mr. Preston: All the dispute is my hearsay answering that hearsay.

Mr. G. W. Taylor: Right, but then also you attend the trial, the person comes in and then it is no longer hearsay.

Mr. Preston: But it is a colouring. When you start any piece of litigation, all the judge has is the pleadings in front of

him, which is the concise statement. He should not have any bias and we feel that the official guardian's report--and it is inadvertent, it certainly isn't intended; it is the way it is done. I am not saying there is any malice or anything. I am just saying there must be a better way for the official guardian to make recommendations. I get reports quite often that merely say, "One side says this, the other side says that." It doesn't have a recommendation at all in it and I don't know what value that is to the judge if there is no recommendation.

Mr. G. W. Taylor: I think the general overall value of the official guardian's report, if it hasn't any other, at least you have a system whereby--and I am sure you have come across them in your practice--there is some insertion and these are usually done by children's aid society workers. I think that is still the practice, Mrs. Purvis.

Mrs. Purvis: Yes.

Mr. G. W. Taylor: That somebody has gone out and required the individual participants in the litigation to make some information available. Indeed, again it may be paternalistic, but somebody from the state has gone to see or inquired and they know that is forthcoming or has a possibility of being forthcoming in the optional situation in the family law court in one of these applications, but in a divorce that they have to explain, I think it is an adequate and reasonable process for the courts to be in under their jurisdiction to say: "Here are two people departing their conjugal life. What is going to happen to the children of that marriage? Are they adequately taken care of?"

There could be many situations where the lawyers can fit in any type of separation agreement. They have not checked. They have just come to an agreement that it's the easiest way to solve this problem, and you and I know there are solicitors out there of that type.

Mr. Preston: I have never heard of a case where there has been a separation agreement and there has been an uncontested divorce that does not claim custody where there is an official guardian's report filed that in any way influences the court. I have never heard of one. If there is, Mrs. Purvis can correct me, but I have never heard of that happening.

Mr. G. W. Taylor: Quite so, but in many of the cases there is the paternalistic feature of the court having to go and see that the children are adequately cared for. I am sure Mrs. Purvis--

Mr. Preston: That only happens in contested cases. It doesn't happen in uncontested cases.

Mr. G. W. Taylor: I recognize that, but it is one of the safety valves or features of the system. Mrs. Purvis and I know of situations where even that has taken a child out of some apprehended danger or some situation that would not have been there had they not had that feature. Again you might suggest certain ways of saying, okay, only on contested ones will we do this, but so far

we have not come to that conclusion. Again they may be not perfect, but it is a safeguard.

Mrs. Purvis: In addition, there are cases, of course, where one party is not around and the children may ostensibly be stuck with one parent, but that parent turns out to be not suitable and in that case we are acting as a screening device to go in.

Mr. Preston: I agree with that, but again that is a children's aid function as well, if the child is in need of protection.

Mrs. Purvis: But we are the ones who catch it before the children's aid.

Mr. Preston: Don't misapprehend what we are saying. We think official guardian's reports are a necessary and valuable tool, but we don't think that tool is being used in the right fashion at all. We think there is an incredible cost burden right now. You pay \$50 to get an official guardian's report. I would guarantee that the \$50 does not cover the cost. The province's and the people's money should not be spent except where it is needed. Perhaps the budget could be best directed to do a better job where it is needed rather than do a three-quarters job where they are all the way across the board. In contested cases it is needed and it is valuable.

We suggest two things. There are certain cases where the official guardian's report is not needed. Let's look at those and take those areas out. Where it is needed, let's improve them. Let's get rid of the hearsay. Let's make their function more valuable. Maybe if we take away all the clerical work they have to do in the unnecessary cases, they have time to do a good job in the cases where they are performing a valuable function.

Mr. Renwick: Why would you say it is not necessary in an uncontested case?

Mr. Preston: If I have a case in which the parties, say, have done a custody battle under this bill after it is passed and they have settled, the custody has been resolved--

Mr. Renwick: Forget about this bill. Why do you say that the official guardian has no part in the case of an uncontested divorce?

Mr. Preston: Not an uncontested divorce, a divorce in which custody has not been claimed or access is not a factor. In those cases they are required to do their function.

Mr. Renwick: The case you stated was that there was a separation agreement and an uncontested divorce. It dealt with custody and access, and I took it that you were saying the official guardian's report was unnecessary.

Mr. Preston: I said if there were no claims for custody and access in the divorce action.

Mr. Renwick: I am talking about the simplest kind of a case, a separation agreement which deals with all aspects of custody, access and everything else about it, a divorce which incorporates or otherwise the separation agreement. I take it you are saying the official guardian is not required.

Mr. Preston: Yes, I would say that.

Mr. Renwick: Why?

Mr. Preston: That is my personal opinion, because I have not seen a case in which the official guardian's report has had any impact on the judge hearing the case or any influence on the case. The official guardian will send out a questionnaire. Both parties will send back the questionnaire saying, "We have resolved it by a separation agreement."

Mr. Renwick: What about the children? They are not represented.

Mr. Preston: But there are no home studies done in those cases.

Mr. Renwick: I am not suggesting it is perfect or anything else. All I am saying is the children are unrepresented.

Mr. Preston: But they are not going to be represented in any event, because what happens in one of those cases--

Mr. Renwick: There is a reference in the official guardian's report to the children.

Mr. Preston: But they won't be represented by the official guardian.

Mr. Renwick: I know they will not be represented, but we will come to that in a minute. All I am saying is that the court does have in front of it a document from the official guardian which is a report and which does deal with the children. Whether or not it is a purely formal matter, whether or not it is there simply to alert the court, whether or not the court treats it in any particular way, why would one take it away?

Mr. Preston: Because it doesn't add anything. In my experience what the document amounts to is a one-line document that says, "There are no problems with custody and access." But you already know that because you have got the separation agreement.

11:30 a.m.

Mr. Renwick: The children have not been concerned in that matter.

Mr. Preston: They have never been concerned in the preparation of the official guardian's report. They don't file any report. The questionnaire is sent to each parent who has already signed a separation agreement. They send back a questionnaire and

that is the end of it. How are the children ever represented in that situation, except inferentially?

Mrs. Purvis: It might surprise you the number of cases in which the situation is as you say and one of the parties comes to us and says: "I have signed a separation agreement. I don't really go along with it. It is not really what I want." They are frightened, they are pushed through, they go ahead with it. If we are there--and they are much more likely to talk to us freely--sometimes the parties are extremely intimidated by their lawyers, which seems a bit strange.

Mr. Preston: I can understand that.

Mrs. Purvis: So they come to us. They have an ear, somebody to talk to, to tell their problems to. We go back and, all right, maybe this was all ironed out before it gets to the judge, but they have that person to talk to, to discuss it. Then we go back to the lawyers and try to get the matter ironed out to suit.

Mr. Preston: I can only indicate that from discussing it with the committee--and there are a number of people on the committee and they all do extensive family law work--you don't do away with something lightly; and we don't make this recommendation lightly. We are very concerned with the official guardian's function, and we have found that perhaps the cost in itself is more excessive than the benefits you receive. In everything in this day and age you have to look at the economics and everything else, and we find it probably isn't cost effective to do these reports.

Mr. Renwick: I agree with that. I am not talking about whether it is cost effective or not. I am talking about the substance of it.

Mr. Preston: I have done family law practice for 10 years now and an untold number of divorces. In all honesty I have never had an uncontested divorce--one that had been uncontested from its inception, rather than a settlement, of course--in which the official guardian's report had an impact on what the judge has said. It has been other than a one-line report. If something comes up in the questionnaires and it is contested, then they do their home studies.

I think the home studies are good, and I think they should be strengthened. I would rather see a change in the thrust. The official guardian should have more impact in the contested cases, in the cases where the people are going through a very expensive procedure. Maybe if they had more impact in that area and produced a report that was more a positive thrust towards the court saying, "We recommend, we have done our study," and maybe do it more in depth and spend their money that way, we think it would be of more value to society.

Mr. Davis: Are there any statistics, Mrs. Purvis, to show how many times the official guardian does get involved where custody or access has not been claimed in the proceeding?

Mrs. Purvis: No, I have no statistics.

Mr. Davis: My experience is the same as Mr. Preston's.

Mr. Renwick: I am not questioning your experience. That may well be right. I just don't think in this kind of situation there is such a thing as an absolute dichotomy between contested and uncontested divorce matters. I don't think you can put one in one box and say, "No, the official guardian doesn't have a role here, but in this box it does." The world isn't that simplistic. What happens in the process is they come out that way as having been uncontested or contested and after the event one can classify them, but during the course of the event it is nowhere near as simplistic.

I feel the emphasis should be placed on the one single sentence at the bottom of your comment on this: "We also feel the official guardian's reports, as presently constituted, do not meet the needs of the court or of the parties." I would think that the capacity and facilities of the official guardian's office are such that they recognize that as well. They are not the kinds of modern reports that should be prepared and that would be useful to the court.

Mr. Preston: What about this point of view? Right now, if a client comes to me and says, "I want a divorce," on whatever grounds, and he has two or three children under 16 and says, "I am not claiming custody, my wife has the children and I am content. I just want a divorce," I must serve and involve the official guardian in that matter. Wouldn't it be better to say that the party who is bringing the children into the contention of the piece of litigation should alert the official guardian at the point when they become involved? So if I serve my petition and just say, "I want a divorce. I am not claiming anything," and the other spouse replies, "I am claiming custody or access," at that point that party should serve the official guardian because it has become a contentious issue.

Mr. Davis: I think we are saying there is some duty on the parties to raise the issue, because if they don't raise the issue there isn't a problem.

Mr. Renwick: Oh, now, come on, if they don't raise the issue, there isn't a problem. Of course, there may well be a problem and that's what the role of the court must be. The fact that two parties don't raise the issue doesn't mean there is no problem. There may be no problem that is brought to the attention of the lawyers representing them, but that does not mean--however, I have gone on at too great length about this. I just don't think the world is that simple.

Mr. Davis: If there is a problem, it would have to be based on statistics we don't have. It is simply that in our experience there have not been cases where neither party wanted custody of the children. That is the sort of thing we don't run into. Generally, there is something in the factual background in a separation case where one party will take the step to go to Mrs. Purvis or will take the step to bring the issue forward and if they don't do that, I don't know exactly what a court can do.

We go back to the position that there is some onus on the people involved to raise the issue because the overwhelming majority of people who are going through a divorce proceeding have been able to resolve their differences and they are footing the bill for a very small proportion or an unknown proportion of the people who are going through divorce or separation proceedings.

Mr. Preston: I think we have hammered that point to death and our positions are clear.

There is one further part of the official guardian's report we feel is important, and that's our recommendation four. As far as the dispute procedure is concerned, we feel that if there is a dispute to the official guardian's report filed, then the investigator should be available to be examined to determine the basis for the report. If the official guardian's report is filed and I don't like it, I have no way of getting at the source of that report in the action. If I am faced with a report that is unfavourable, I should be able, in an adversary system, to get at the person who filed the report, the investigator or whoever, to cross-examine the basis for the report.

Mr. G. W. Taylor: Isn't that available under the combined situation now under section 32, where, first of all, the court may require the OG's report to be done in accordance with section 1 of the Matrimonial Causes Act? Section 1(5) of the Matrimonial Causes Act provides that where there is some dispute into the contents of the report then you can follow up on that dispute.

Mr. Preston: You can file a dispute but you can't get at the investigator. How do you get at the investigator?

Mr. G. W. Taylor: Because it continues on, "cause the person making the investigation to attend as a witness," so that you have the opportunity of the person who has actually prepared that report attending as a witness.

Mrs. Purvis: That is at present in the Matrimonial Causes Act.

Mr. Preston: I am sorry, that was in the Matrimonial Causes Act, it wasn't in Bill 140. It is back in the Matrimonial Causes Act and that's the problem with moving it back and forth.

Mrs. Purvis: I might say that in about 90 per cent of the cases where there is a dispute, the dispute really isn't anything the social worker can solve by being examined. It is usually a dispute where the wife said something that the husband didn't like and the social worker is no use in that case.

Mr. Preston: The dispute is a vehicle that is not often used. People have a way of saying: "Ah, the OG's report is in. I will just go around it."

Mrs. Purvis: I'd say we get disputes in 50 per cent of the cases.

Mr. Preston: That surprises me because everyone I have talked to says--

Mr. G. W. Taylor: That's because you are not using the technique.

Mr. Preston: No, I use disputes often. In talking to the committee I was one of the few who used disputes and that's what--

Mrs. Purvis: It used to be a rarely used tool but they seem to be on to it.

Mr. Spensieri: They are catching on to you.

11:40 a.m.

Mr. Preston: Maybe I am a leader. I don't know.

Those are all the comments I can make on the official guardian's section of our brief.

Mr. Renwick: I am neither an expert nor do I want to be an instant expert in the field, but what is confusing me, and led to my request that a representative from the official guardian's office be here, is the question of representation rather than this question of reporting. I am quite confused about why it is necessary to have section 32. I am not talking about making the child a party, I am talking about the child being represented. Mr. Shipley and Mr. Beecroft were kind enough to make available to us yesterday the provision of the Judicature Act and a couple of cases dealing with the question of the jurisdiction of the court to appoint a representative or counsel for the child.

I suppose my first question relates to the ministry. Why don't we simply provide that the court will appoint a representative for the child, or why don't we specifically say that the child shall be entitled to be represented in the proceedings unless the court in its discretion decides otherwise, or some such language? Why don't we go that route? Then if the representative, as determined by the court, is the official guardian, the official guardian would carry out the functions in substitution for section 32. Again, we are talking about the interests of the child, whether you call it custody, support and education of the child or whether you call it the best interests of the child, and the various items that are to be quantified in some way to take into account what the circumstances of that child are. Why don't you go that route and clear up this problem of representation?

Mr. G. W. Taylor: Mr. Renwick, you were inquiring yesterday if the official guardian happened to be appointed, as is possible under some of the different features of this act, what capacity or ability the official guardian would have to carry out that investigative function, the social part of it, the emotional part of it, the interrogation part of it, and if the official guardian did have that capacity at present, whether it would have that capacity if it became an automatic function of each and every situation.

Mr. Renwick: I can only go from what was very kindly provided to us in re Reid and Reid by Justice Galligan in the High Court, divisional court. After going through the various matters, he refers to the authority of section 107 (now 109) of the Judicature Act 107. He then goes on: "I think, in addition to that statutory authority, this court, having the powers of a court of equity, has inherent power representing the sovereign in its capacity as parens patriae to protect the rights of any person under a legal disability, which of course includes infants. Although there are no reported decisions in Ontario where orders have been made ordering representation for infants in custody cases, I am advised that the official guardian has been appointed to represent them in a number of cases by judges of this court...

"We are agreed that section 107(2) (now 109) of the Judicature Act gives us power to appoint the official guardian as guardian ad litem of these three children. Since this is a case where the rights and best interests of the children may not be adequately represented in these proceedings by their parents, it is the opinion of this court that this is an appropriate case for the appointment of the official guardian to protect the interests of the children and to act for them in these proceedings. That representation must be full, complete and independent.

"An order will issue, therefore, appointing the official guardian as guardian ad litem of the infants, with full power to act for the infants as though they were parties to these proceedings. Without limiting the generality of the foregoing, the official guardian will have the right: 1. To make full, independent investigation of all the circumstances relating to the best interests of the children." He then goes on to deal with production and discovery, appearance and participation, examination and cross-examination, taking appeals, the costs and so forth.

Taking the comments I have just quoted of Mr. Justice Galligan, my answer to you would be that this appointment of the official guardian as guardian ad litem for an infant in a custody case would include the power to make full, independent investigation of all the circumstances relating to the best interests of the children. It seems to me that would encompass all of the authority, probably even more adequately than the wording of section 32, and would give the official guardian status in the matter to deal with it, so that the court would have the benefit of a full and complete assessment.

With great respect to the official guardian's office, I do believe that statement in our witness's brief that is before us, which I quoted a few minutes ago: "We also feel that the official guardian's report as presently constituted does not meet the needs of the court or of the parties." That is probably an understatement and leads to a lot of problems. Why don't we go the direct route and have the official guardian--or, as I understand the position of the court, it does not need to be the official guardian who is always appointed. Perhaps Mr. Shipley or Mr. Beecroft or our witnesses here would correct me. The court could appoint counsel to represent them apart from the official guardian, as I understand it, under this inherent jurisdiction. Have I made my request clear? Why don't we go that route?

Then we solve three things. Without making the child a party to the proceedings, which I think is much too big a step to be taken. I don't think it would be acceptable to the ministry or to those within the assembly who are knowledgeable about it, despite the excellence of the brief that was made by Justice for Children yesterday. But at least the child would be represented. The statute would provide that the child is entitled to be represented unless the court otherwise decides.

11:50 a.m.

In other words, the court would have to make a specific decision that it is not necessary in a particular instance. Otherwise, the child would be represented through the official guardian where that is appropriate, always reserving the right in the court to appoint counsel apart from the official guardian if it again made sense to do so. Why don't we go that route and get some sense that the child has a somewhat clearer recognition as being something other than just the object of the exercise who has, as an individual, as a human being, a role of being seen to participate?

Mr. G. W. Taylor: As you are aware, Mr. Renwick, as you commented on the brief made by Justice for Children yesterday--which again was an excellent brief, departing naturally from the philosophy of this particular act--I guess if you want to label theirs, they thought that each child should be able to have representation of his own in any type of proceeding of this nature. That was not the intention of this particular act nor is it the route the Attorney General is now putting forward in this piece of legislation.

We have two situations, one of which has been brought out this morning, the first one being where the court so decides this situation under section 32, it is a "may" section, may have the official guardian to cause an investigation. That is one feature. There is also the feature under section 30 where the court, if it so desires, can ask for independent assistance other than the official guardian to prepare a report, somebody who has technical and professional skill to assess and report to the court. That is another feature available to the court in assessing what is for the best interest of the child.

Neither one of those comes into the legal definition of a person representing the child as such in the solicitor-client relationship as we probably know it in law. You have the next feature under guardianship, which gets you into the physical assets, as the wills and trusts section made, where you can again have an appointment made for the economic reasons of looking after an individual's estate. Those are the three types of features.

Then there is the overriding one. All of these are by the option of the court reflecting on the situation in front of them regarding the best interests of that particular child, rather than each and every case that comes before the court that the official guardian is required to make. One can draw an argument that if it is required in dissolution, although we may think that is the ultimate situation, there may be many matrimonial family units that

are less than dissolution where an official guardian's report could obviously be required and might be a very excellent and ideal situation, but we get into some other features about why that can't be possible at this stage where every application for custody should have an official guardian's report filed, and that is why the "may" is in the section.

Then we go to the provincial court regulations which, I draw to your attention, Mr. Renwick, may solve the problem as presented by the justice committee. Maybe one that will allow your mind to rest easier with the present legislation is section 36 of the Provincial Court Act regulations: "Where the court is satisfied that the interests of a minor or a person of unsound mind are involved in a proceeding, the court may give such direction for the representation of the minor or person of unsound mind as the court considers proper." So there is by regulation, by law, the ability in the court to appoint a representative for a child in the provincial court.

Mr. Renwick: That is right and in the unified court.

Mr. G. W. Taylor: And in the unified court, it applies to all our courts. So the court has the ability in recognizing, and again you might say it may be too late, but how do we devise a method, other than saying automatically a child gets one? We have left it in the positive here, we haven't prevented them from denying representation to a child, but there is an ability in the court, when a situation comes before it, to direct that representation be applied for that child.

Mr. Renwick: May I interrupt for a second? When we go through the hierarchy of the courts, I certainly got the impression yesterday that it may well be clear so far as the inherent jurisdiction of the High Court is concerned. It may well be clear by virtue of the provisions you cited with respect to the family court now. I gather that in the county or district courts it is not all that clear, except by what was referred to as the device of adjourning the matter to consult with the official guardian, that there is apparently some gap in the authority of the court to act. I don't want to lay our proceedings on that, but surely one of our obligations will be to clarify that question.

There is the family court, the surrogate court, the county court and the High Court. I think there is a question still open, from what we were advised yesterday, with respect to the county courts on this question of representation. There is no problem by virtue of the regulation that you just quoted with respect to the family court or the unified court. I just want to make certain that the court, whichever one of the courts as defined in the bill, is there, that they have got that authority and that there is no question about that authority.

It seems to me that one of the ways to do that is to state in this bill that they do have it. Then we come clearly within the Judicature Act that the official guardian shall be the guardian ad litem or next friend of minors and other persons in accordance with any act or the rule or an order of the court or a judge.

Mr. G. W. Taylor: I understand the position you are making, Mr. Renwick. My mind falls short like yours at this present time, and I can't think back to my days of practice whether there is sufficient in the Judicature Act or the County Courts Act for the judge, when hearing a situation, to appoint somebody. I recall in cases where they had some interest or some bearing on the decision, one could always have a solicitor appointed to represent that interest or that individual. I will have the adviser for the Attorney General's department investigate that.

Mr. Renwick: Can I make another point in connection with this? I am really concerned about the trilogy of words which keeps being thrown in and they are all different. When I read section 30(1) you have the question of the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child. You have that in subsection 15: "The appointment of a person under subsection 1 does not prevent the parties or counsel representing the child from submitting other expert evidence as to the needs of the child and the ability and willingness of the parties...to satisfy the needs of the child." Earlier, we had the best interests of the child.

Then in section 32 we have to "cause an investigation to be made and to report to the court upon all matters relating to the custody, support and education of the child." It seems to me that if we are going to the concept of the best interests of the child, surely we should begin to use the same language. For example, if you are going to keep 32, it seems to me that you should be using some language such as Mr. Justice Galligan used in Reid and Reid to make full independent investigation of all the circumstances relating to the best interests of the children.

Maybe I am being too simple about it but it does seem to me some amount of confusion when you start using all of these words, any one of which are matters of ambiguity requiring a great deal of judgement to be exercised, to give content to the meaning of the words.

12 noon

Mr. G. W. Taylor: Like you, Mr. Renwick, I have that legal background and I can accept your arguments, and can see some of the difficulties with these words as you have said, particularly when you refer to section 32: can the report and should the report be only to the exclusion of custody, support and education? You might say that they should investigate something more if the official guardian is going to cause an investigation in--the words you have indicated--the best interests of the child. Should there be the general term in there to say, "I am sorry, that official guardian's report cannot be accepted because you have inserted something in that report, because you have investigated something other than custody, support and education."

I acknowledge your comments and I will have those discussed with the advisers to the Attorney General. In regard to "satisfy the needs of the child" in section 30, the final words there, the background for that was your requiring of a professional person certain features, and that person is reporting to satisfy the needs

of the child. But your position is well taken in that "in the best interests of the child" may be more appropriate wording than "the needs of the child."

Mr. Renwick: I happen to like that language, "the needs of the child," but then when I come to section 24(2), when we are talking about the best interests of the child, there is no reference to the needs of the child as such. You seem to switch from the needs of the child and an assessment of the needs of the child to this other strange thing, the best interests of the child. I find it conceptually very confusing. I assume that practitioners at the bar do not have that problem.

Mr. Preston: We were not particularly worried about it in section 30 because that is for the assessment. It is difficult.

Mr. G. W. Taylor: My adviser informs me that it was one of your earlier suggestions to put that in there, rather than "in the best interests of the child." That was in your recommendations that followed from your previous brief.

Mr. Preston: I do not think there is much difference between "needs" and "the best interests," but the needs are a more concrete thing for the assessors to deal with. It is the court that determines what the best interests are. It is the assessors who deal with the needs in their recommendations to the court, I would think. There may be specific needs.

I agree with Mr. Renwick's position, though, about section 32 when it limits it to custody, support and education. I just do not think that is appropriate. The report should deal with what the bill is dealing with.

Mr. Renwick: I would think so, or you would have serious problems about whether the report conforms to the requirements and to what extent it is limited in its ambit. Perhaps it is not even limited; it may be covering some areas that are not covered otherwise.

Mr. G. W. Taylor: To comment on why section 32 shows custody, support and education of the child, this is one difficulty in working with many jurisdictions and many acts. The words have been retrieved from the Matrimonial Causes Act and used in the language of this act, so at least there is some continuity and comparison between the two acts.

Mr. Renwick: I guessed that was probably the case, but in that case, why use the shorthand method? Why not eliminate the cross-reference and try to make this statute speak for itself? It creates an unnecessary evil by using the cross-reference and having to use the terms, "support and education of the child." It is the only place it does appear in the bill.

Mr. G. W. Taylor: I think it was to keep consistency between the two acts and the duties and functions of the official guardian consistent between the two acts. However, this act contains something extra in section 30, the ability to go out and get further and greater information than that which the official

guardian may provide, by appointing a person of professional skill, if that were deemed to be the case, to gain more than what the official guardian could achieve under the option. That is why the difference in the two.

Mr. Renwick: Mr. Chairman, could I finish off with the questions I have for Mrs. Purvis? Really, Mrs. Purvis, what I was interested in was to find out in how many custody situations is the official guardian appointed as guardian ad litem?

Mrs. Purvis: We have maybe about 400 cases. If I may introduce Mr. George Glass, from our office, who has some familiarity with these matters, he could reply to that.

Mr. Glass: Between 400 and 500 at the present time.

Mr. Renwick: What is the history of that? Is that a traditional jurisdiction of yours?

Mr. Glass: No, it is not. It has been growing over the last few years, and I would think particularly in the last three or four years it has grown significantly.

Mr. Renwick: You have been with the official guardian for some time?

Mr. Glass: I have been with the official guardian for about four and a half years.

Mrs. Purvis: And I can say on top of that it has been growing for some time before that.

Mr. Renwick: Say 10 years ago, Mrs. Purvis, would you--

Mrs. Purvis: Not quite that long, no.

Mr. Renwick: No, but from the time you have been there.

Mrs. Purvis: I guess from the time of the Reid case, really. We may have had the odd one before that.

Mr. Renwick: But from, say, 1975 on, it has been growing.

Mrs. Purvis: Right, yes.

Mr. Renwick: So it reflects a different philosophy towards the problems involved, I assume. This was the procedure that was adopted.

Mrs. Purvis: Yes.

Mr. Renwick: What is your sense, Mr. Glass--I am not asking you to be critical of your office but you can be critical of the government if you want, about personnel and resources if you want--what is the capacity of your office to handle these matters adequately?

Mr. Glass: Of course, outside of Toronto the official

guardian's agents deal with them, and so far that has proved to be satisfactory. Within Toronto, where of course roughly, I would say, more than half of our volume is, we are capable of handling it. We are tight, pushed, but so far we have been able to manage.

Mr. Renwick: You can see your role as such, as counsel for the child?

Mr. Glass: Yes. There is an interesting philosophical controversy, I suppose, about that, but essentially the official guardian is appointed as guardian ad litem for the child and I suppose whatever that implies, "guardian ad litem," we are counsel and guardian ad litem for the child.

Mr. Renwick: I was just taking Mr. Justice Galligan's comment--I am not going to repeat it because I did before you appeared, and you are probably aware of it--but he sets out that an order will issue appointing the official guardian as guardian ad litem of the infants, with full power to act for the infants as though they were parties to these proceedings. Without limiting the generality of the foregoing the official guardian will have--

Mr. Glass: Yes, I am familiar with it.

Mr. Renwick: --one, two, three, four and so on, and the costs and so on. Is that the way you conceive your role?

Mr. Glass: Yes, that is correct.

Mr. Renwick: If you had to define it, that would be as good a way as any, the plenitude of its ambit.

Mr. Glass: That is the form of order we normally use.

Mr. Renwick: When you say you appoint an agent, you simply appoint a lawyer in another jurisdiction outside Metropolitan Toronto?

Mr. Glass: The official guardian has certain designated agents in each county town.

Mr. Renwick: I see, to be you.

Mr. Glass: To act on behalf of the official guardian, not only in custody matters but in any matter involving the official guardian.

Mr. Renwick: They do not appear in their own name, they appear in the name of the official guardian.

Mr. Glass: That is correct.

Mr. Renwick: What about the extent of the investigation bit, part of the ambit of your powers to make a full independent investigation of all of the circumstances relating to the best interests of the children? Could you describe what you do in, say, such a thing as a typical case if there were one?

12:10 p.m.

Mr. Glass: I would say the extent of our investigation is three-pronged. Normally the lawyer who is acting will attempt to interview the other counsel and the parties, as well as the children if they are old enough to be interviewed. In appropriate cases, we will go through the usual sort of home study that is done for an official guardian's report.

In a number of cases, if that is deemed appropriate, we will attempt to persuade the parties to go through a professional assessment of some kind: psychiatric, psychological or whatever seems to be the appropriate type of professional assessment under the circumstances. Those are the major three areas in which we do our investigation. Occasionally, fairly rarely, we will have one of our workers speak to other people who may have some knowledge about the matter.

Mr. Renwick: Are you familiar with section 32 of this bill that we are looking at?

Mr. Glass: The section about the official guardian's report? Is that the one you are talking on?

Mr. Renwick: Yes. To what extent is that report less complete?

Mr. Glass: In the ordinary divorce case, the procedure that is usually followed--I think perhaps Mrs. Purvis should speak to this because she is the one who is really in charge of it; maybe she should go through it as to what the procedure is in the ordinary report case.

Mrs. Purvis: I think the point you are looking for is that the reports we do are social-work oriented.

Mr. Renwick: It is not representing the child as such?

Mrs. Purvis: No, that's right. We use professional social workers, usually with master's degrees in social work. They interview the parties.

Mr. Renwick: And the children?

Mrs. Purvis: Yes.

Mr. Renwick: And do something called a home study?

Mrs. Purvis: Yes, that's right. They assess what the problems are. They then pass that report to the solicitor who is representing the children to use as evidence.

Mr. Renwick: Reverting to the other discussion we had earlier, would that be the same study done whether it was contested or uncontested?

Mrs. Purvis: In uncontested cases, we usually do a

short-form report if it is appropriate. If there are not glaring issues to be discussed or to be looked into, we will do a short-form report.

Mr. Renwick: Would that involve any interview or discussion with the children?

Mrs. Purvis: Not with the children, no. It is usually with the parents, by phone or a personal visit in the office. But if there are no issues before the court, then we would not likely go to visit the home unless we felt there was something in the parties' questionnaires to indicate some concern from some other point of view.

Mr. Renwick: So if there were matters related to intimidation or duress or difficulties affecting the children, they just would not come to the surface at all in a report made by you in an uncontested case?

Mrs. Purvis: Unless it was indicated in some other way.

Mr. Renwick: Unless it happened to be triggered some way. It would not be as a result of your investigation?

Mrs. Purvis: I suppose it could be. As I say, the social workers we have are fairly skilled. Quite often in the questionnaires that are returned, they do pick up things.

Mr. Renwick: Some sense of something further.

Mrs. Purvis: Yes, and then they would ask for a full investigation and send out workers.

Mr. Renwick: What do you anticipate regarding that projection? What is that curve going to look like on cases, if it has gone up to 300 or 400 in four or five years? Does it give any indication of levelling out or is it too early to tell?

Mrs. Purvis: The big thing there is that we do now have some control and we can maybe keep it in line or whatever the situation is. When you were suggesting about something being put into the act to make it a little more specific, it might trigger a rash of cases, or maybe it is not even necessary. For instance, in the Reid case, that is a trial. That was quite an appropriate case where Mr. Justice Galligan ordered us to be in.

But we find that in a lot of instances the lawyers will go to the court well before the trial and ask the judge for an order appointing us. Sometimes we get into it without even being advised. The judge will make the order ex parte--that is, without our presence--and we're involved in a case, and we find later on down the line that it really isn't an appropriate case at all. So the judge making the order isn't necessarily aware of all the facts that are going to be brought out.

Mr. Renwick: How many do you have in Toronto handling these cases?

Mrs. Purvis: Three and a half.

Mr. Renwick: That's quite a caseload. Do you think it is levelling out, or can you tell?

Mr. Glass: It's hard to tell. The trend has been up.

Mr. Renwick: So a couple of years from now it might be 600.

Mr. Glass: Your guess is as good as anybody's, I suppose.

Mr. Renwick: Yes, but on the basis of 100 a year. I'm just using 1975: six years, 400 cases--

Mrs. Purvis: It could well be because the complexity of the cases seems, for some reason, to be getting more intense.

Mr. Preston: I would like to make a comment that I think might be of assistance. According to my reading of the act I think the mediation section will have a way of alleviating the amount to go to the official guardian. Speaking as a practitioner, a lot of times we have intractable parties and I may have a client who says to me, "I want to do this." I may believe that this is not in the best interests of the child, but I'm still representing my party and I may want somebody in between in there. At that time we want the OG involved.

If we have these mediation provisions, arbitration provisions, assessments and those kinds of things, that's an independent third party that may well, as a result of this bill, lower the caseload on the official guardian. So I think that's a factor that has to be considered.

The official guardian is often the only independent person who is looking after the kids in the action, and a family law practitioner, because of the adversary system, may be forced to advocate on behalf of his client something that he doesn't necessarily think is in the best interests of the child.

Mr. Renwick: Yes, I recognize that.

Mr. Preston: That's quite often why I would refer something to the official guardian: purely because I may be questioning even what my client's motives are. Often they fight for their own motives and not for what's in the best interests of the child.

I don't know whether the official guardian has the view that the mediation provisions may lower its caseload in this bill.

Mr. Glass: Certainly where the role of the official guardian has been found most useful has been in attempting to mediate and also in attempting to persuade the parties to undergo expert assessments. To the extent that the act gives the court some authority to do that it may help to moderate the caseload.

The reverse factor is simply the tendency of the bar to

become more aware of the official guardian's ability to intervene.

Mr. Preston: That's good, I suppose, isn't it?

Mr. Glass: But it does tend to push it the other way.

Mr. Preston: Yes, but I think the answer to that is maybe that they should raise your budget and increase your staff, because we find that you are performing a very valuable function. It's no good to leave it out because you haven't got the ability to cope with the caseload. Maybe they should up the caseload and up the number of people dealing with it.

Mr. Davis: I might make a point, and perhaps Mr. Glass can help on this. My impression of the initial involvement of the official guardian was that Mr. Justice Galligan sort of let them in the back door, and by using some rather creative legal reasoning managed to extend the previous definition of guardian ad litem to an area where no one had really intended it to be extended. What I don't understand is, if we all agree that the official guardian is performing a good function, why is there a reticence simply to say in a statute that this is its function? The provincial court has made those rules. The rules committee is considering a proposed amendment to the rules to provide for legal representation for children.

There may be some doubt that the county court has exactly the same jurisdiction as the Supreme Court. But if we agree that it is a good function, why should there not be a specific provision that, where a court feels it is necessary, they come out and say so? Here is the role we see the official guardian performing, and to tailor that to an individual situation and say in this case, "You should participate in discovery." In this case discoveries aren't necessary; we want to go straight through to the next step in the proceedings.

12:20 p.m.

Mr. Glass: I think the answer to that is quite simple. I won't comment on the county court; I think there is some dispute about that. But apart from that aspect of the matter it has been our experience that if something is sort of thrust into the statute there is no question that it tends to expand. It is sort of like Parkinson's law: it expands to fill the space that's available. If the jurisdiction is already there and it really isn't necessary to put it in the act I don't see any point in doing it, because that may lead to a tendency to really water down, if anything, the ability to perform in the cases where it is really needed.

Mr. Preston: But then you are really hiding your light under a bushel. You're saying, "If you can find out where the jurisdiction lies then we can find you, and only the good ones are going to find you." Where I'm concerned is that there are thousands of practitioners out there who dabble in family law, and they don't know what they can do; they don't know about these jurisdictional problems, and they maybe haven't read the Reid case. If people deal in family law every day, that's not a problem: they know how to get at you. It's those who don't, and I am concerned that it should be

spelled out right here so that it's available for everybody. Why should it be available only to the smart ones?

Mr. Renwick: I'm very pleased to have that kind of support because, however it's done, and I'm not suggesting that it go--I suggested a few minutes ago (inaudible) perhaps the child is entitled to be represented unless--there are any number of forms of words.

But I think it would be helpful to embody the discretion of the court in statutory language so that it's very clear about it. I don't like to place it that way, but I recognize the restraint that the official guardian's office used on it because, in a sense--I shouldn't say this--I get the impression that the court likely thinks of that discretionary power as a kind of residual safeguard rather than in an up-front sense: "Yes, we can intervene if we get the particular unresolved problem of the Reid case or some such difficult case." A court will say, "Oh yes, we have the power to do this. We will set that order aside and we will do it over again."

But to get away from the residual sense and to clarify that all of the courts have got this responsibility, it should be possible in a form of words to embody that discretion in the court, because then the court is obligated at least to exercise this discretion. It doesn't have to; it has to look at the question, but it doesn't have to say that in every case it is going to do it. I would certainly be glad not to press any further on the issue at this stage if we could get some such phraseology to meet the requirement.

Mr. Davis: If I might interject, Mr. Chairman and Mr. Renwick, on page 16 of the brief, the wording the committee proposes would be more or less as follows: Where "the parties, through disability or disinclination, may fail to present adequate information to enable the court to determine which proposed custody arrangement is in the best interests of the child" then they could appoint counsel in those circumstances.

We take the position that in most cases both parents will let all the information come out, but there certainly are cases where parties are warring so heatedly between themselves that they may overlook the children in the battle. A ruling of that type, in my submission, would allow this to be used in the case where it is necessary and not open the floodgate, because you would have to be able to prove to a judge that in this case representation is necessary. If that causes Mr. Glass's department to be overloaded then I suggest that it is a necessary evil.

Mr. Spensieri: I was just going to ask Mr. Glass: I think the trend seems to be that even if we don't make children parties to these proceedings and even if we don't have a specific right to representation built in, the trend, as Mr. Renwick has perceived, is going to be to have the OG involved more and more as a guardian ad litem, which in effect really means almost as an adversarial type of advocate for the child. It's almost the same type of function that you recommended yourself: that you become, in effect, counsel for the child.

If those trends are going to be increasing, and given that you have already done some delegation outside Toronto, do you see any specific restrictions on the OG in delegating the function to, say, members of the profession and then just keeping a watching brief on that file? I think that might be a way of expanding the manpower available, providing representation and still not opening the floodgates. Are there any comments on that?

Mr. Glass: Historically there have been a few cases, perhaps more than a few, where private practitioners have sought to represent a child. Almost invariably in every case the court has requested that the OG intervene. I think the courts simply see the official guardian as being more objective and less adversarial and perhaps as having more of a mediating function.

I should comment that I'm not sure I agree with your perception of the role of the official guardian. I think the role of the official guardian is not quite to be an advocate for the child if it is thought that this means what the child wants, necessarily and solely in that context. I think the official guardian perceives his role to be that of a guardian ad litem in the full meaning of that context. Certainly as far as the judges are concerned I will simply leave it at that. It has been perceived that they feel that the official guardian and his staff are the appropriate ones to deal with it.

Mr. Spensieri: Mine was more of a technical question. If you have these orders appointing guardians ad litem mushrooming to, say, 1,000 a year or 2,000 a year in the near future, do you see any inherent limitations on your ability to delegate and appoint specific practitioners to carry out your work and just keep a watching brief on it? Is there anything to restrict you?

Mr. Glass: Yes, there's an economic restriction in terms of the budget.

Mr. Spensieri: But aren't there provisions for costs here in the event that there is an appointment? I had understood that there were provisions for costs in the act.

Mr. G. W. Taylor: But if you were saying official guardian or guardian ad litem the costs are invariably those of the taxpayers and the state. They are not put against the child; there is no source of funds there. There is a possibility, if you were looking at the guardianship, of taking it out of an estate, if there were a financial estate. That's a possibility in an order. I was going to ask Mr. Glass questions on that. If it's in regard to what is in the best interests of the child's custody, access, interim custody or interim access, that is a litigant in regard to the child. Who is to pay the costs of that lawyer or the social worker, whoever it happens to be? Those invariably will not come from one or the other of the applicant or the respondent to the issue, but would in effect be the state. And as Mr. Glass has said--

Mr. Glass: I'm not sure that's completely accurate.

Mr. G. W. Taylor: It has a possibility.

Mr. Glass: In many cases the court requires the parents to split the costs of the official guardian. In some cases the official guardian is not, however, awarded any costs and he just sort of swallows it and, as you say, it comes out of the taxpayer's pocket.

12:30 p.m.

The point is there is a limitation. I was asked about limitation and the limitation is we do not know in advance, while we can make some sort of estimate. Certainly as the caseload grows, the cost to the official guardian's office of either retaining outside counsel or hiring in-house counsel to handle the caseload is going to increase.

Mr. Spensieri: But does not the impetus for your appointment usually come from the main litigants? Do they not apply to a judge and say, "Would you appoint the official guardian ad litem?" So in the order of appointing him, can there be a provision made for the question of fiduciary cost?

Mr. Glass: There can be but the courts traditionally have a discretion in the matter. The judges are very jealous of that discretion and they like to feel in a case where they think it is appropriate that they will not award the costs or they need not award the costs.

Mr. Spensieri: Our difficulty here is that obviously the ministry does not want to take a position that children should be made parties. We also do not want to accept the right of independent legal advice or representation for the children. It seems to me a terrible injustice would be done if we were to have costs as the main blockage for even having the guardian ad litem who is used to a very limited role. I do not think manpower, personnel or cost should come in the way of encouraging this trend. I just want your comments on that.

Mr. G. W. Taylor: I was going to ask too, following that, what is the trend of those 400 cases? Are they in regard to property, custody of access? What percentage do your caseloads now fall into?

Mr. Glass: The only cases where we are appointed as guardian ad litem would be those where the issue is custody or access. If it is strictly a matter of property, I am not talking about a divorce or separation type of situation.

Of course, the official guardian has its traditional role in terms of estates with regard to the property of minors, but apart from that aspect of the matter, where there is a breakdown in the family, if I can use that as a generic term, the only issues we get involved in are those of custody and access, and sometimes peripherally in so far as support of the children is concerned, but that would only be where it is obvious that the ability of the parent who is going to have custody to care for the child is going to be so seriously affected that the child's welfare would be affected if we did not intervene in some way with respect to support.

In the average support case, where the dispute is really over quantum not over whether there should be support, then we do not get involved.

Mr. Renwick: I appreciate the official representatives of the official guardian being with us this morning, but I do not think we need to detain them further at this point.

Mr. Chairman: Recognizing the clock, quickly are there any other questions anybody wishes to address to the official guardian's representatives?

Mr. Preston: Can I just ask one thing of them before they go? Under the Child Welfare Act, of course you have the child welfare panel where practitioners are appointed to a panel and act as agents of the OG in representing children in child welfare cases. Would it not be appropriate to do the same thing in these kinds of cases? Could you not establish a similar panel to ease your own in-house burden?

Mr. Glass: I think the whole duty of a person acting for a child in a custody case and everything that he is geared to concern himself with is different from what it would be in a child welfare case. The law society has laid down fairly strict restrictions on counsel in child welfare cases and said that, essentially, counsel simply represents the child's wishes to the extent that the child is capable of expressing those.

Mr. Preston: Or its best interests.

Mr. Glass: No.

Mr. Preston: The questionnaire compels you to answer if it--

Mr. Glass: But I am saying in an ordinary custody case that may not be the proper approach and therefore we are not sure, we would have serious qualms about whether a panel is the appropriate way, certainly in view of the fact that most of the judges are less than happy with outside counsel representing children in custody cases.

Mr. Preston: Is that not that because the outside lawyers who come in are generally hired or approached by the children themselves and that is how they get involved? The question holds about the children hiring somebody. Is that not how you get outside counsel in the custody cases? I think they simply perceive that the official guardian is more objective.

Being on a child welfare panel, I find that when I attend provincial court on one of those cases, they treat me as if I am a representative of the official guardian and on that basis. They do not draw a distinction or I have not run into it.

Mr. Glass: I can only tell you what my experience has been.

Mr. Chairman: Members of the committee, how do you wish to proceed this afternoon? We are only about halfway through the Canadian Bar Association's submission. Shall we continue with that and then go to clause-by-clause following that?

The committee recessed at 12:36 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

BILL 125, CHILDREN'S LAW REFORM AMENDMENT ACT

WEDNESDAY, JANUARY 13, 1982

Afternoon Sitting



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From the Ministry of the Attorney General:

Beecroft, D. A., Counsel, Policy Development Division
Shipley, A. Q., Counsel, Policy Development Division
Taylor, G., M.P.P., Parliamentary Assistant
Tucker, A. S., Legislative Counsel

Witnesses

From the Canadian Bar Association (Ontario Branch):
Davis, R., Member
Preston, R., Chairman

From the Official Guardians Office:

Glass, G.W., Q.C., Legal Services
Purvis, E.C., Q.C., Acting Deputy Official Guardian

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Wednesday, January 13, 1982

The committee resumed at 2:05 p.m. in committee room No. 1.

CHILDREN'S LAW REFORM AMENDMENT ACT
(continued)

Resuming consideration of Bill 125, An Act to amend the Children's Law Reform Act.

Mr. Chairman: I see a quorum. Shall we continue with our consideration of Bill 125? We are in the midst of hearing from the Canadian Bar Association, family law section. Would you carry on, please, gentlemen. I believe we are on page nine, on enforcement.

Mr. Preston: Mr. Chairman, as the matter of representation was raised before the luncheon break, perhaps for continuity we should let Mr. Davis deal with our recommendations as to representation and finish that off.

Mr. Davis: The submissions on representation start at page 16 of the brief and continue for two pages after that. The main section to be referred to is section 65, which deals with the right of a child to be heard and makes reference to the fact that a child could have counsel, if any, present during the interview. There are two other references in the bill in sections 30 and 31 to a child's counsel, but there is nothing in the bill that goes further than that. The issue of what counsel can and can't do is not addressed.

We are left in a position where potential lawyers for children will be unsure of just what their role is. I don't want to repeat the remarks that were made with respect to the Reid case. There clearly has been judicial permission given to an expanded role for counsel, but the submission the bar association makes is that the question of what counsel's role is should be straightforwardly addressed and not left to be brought in the back door through expanding the role of guardian ad litem or requiring that judges try to create legislation.

2:10 p.m.

If the Legislature of the government feels there are cases where representation is appropriate, then I submit they should say so directly. They should also go further and say just what role or participation counsel should have in any given circumstance. There has been previous reference to the unclear position of a judge to make orders appointing counsel in the county courts. In Toronto we tend to forget or not to emphasize the county court situation so much, because the Supreme Court is also readily available and many of the applications are made in the Supreme Court. The use of the device of appointing guardians ad litem is unnecessary and I submit the matter should be addressed straightforwardly.

One other matter that occurred to us during the original presentation is that there is a danger, I suppose, that if the Legislature passes this bill in the form it is now and simply does not give any kind of scope to counsel's role, the court might subsequently come along and say that Mr. Justice Galligan's order that counsel's role be expanded has been superseded by legislation. The courts will look to this and say this is what the Legislature has determined as far as counsel is concerned. They do not give it a specific role. They simply refer to counsel as *amicus curiae*, who is there to assist the court in whatever deliberations the court may have, but who is clearly not given an advocacy role.

I submit it could clearly be argued that the Reid case is not going to be good law if the Legislature is taken to have restricted the role of counsel by passing the bill in the form it is now. It is arguable on both sides. I concede that the section does not specifically come out and say counsel can only do this, but it is an area where there should be some clarification.

I would point out that the provincial court has already made a rule with respect to representation of children. The unified family court has a rule that permits representation. The civil procedure revision committee has before it now a proposal for representation for children, which is referred to at page 17 of the brief. In my submission, to enact through legislation a specific statement that says counsel is available in restricted situations would be to get rid of any doubt as to what the Legislature intended and to recognize that there are cases where children ought to be represented.

I submit the wording I referred to this morning would give a restricted enough view so that it wouldn't open the floodgates in this area. I suggest the wording be in the same terms as the second paragraph on page 16, where "the parties, through disability or disinclination, may fail to present adequate information to enable the court to determine which proposed custody arrangement is in the best interests of the child." In effect, that is what the Reid case says now but, as I say, to approach it frontally rather than through the back door is appropriate.

To illustrate one clear possible conflict, in section 65 there is no reference to what counsel can do. I submit it is quite feasible that the Legislature will be taken to have said that counsel may not make submissions on behalf of a child. They have said the child is entitled to be advised by and to have counsel, if any, present during the interview. Clearly they have spoken on the role of counsel in that subsection, and I can easily see a judge coming along and saying a child can have counsel but that counsel can't speak.

I submit that would not be the intention of the Legislature. So in that area specifically there is an illustration of why the role of counsel should be spelled out, why it should be addressed on a frontal basis, because here clearly in section 65(4) a judge may say, "The Legislature has spoken. They have said a child cannot have his counsel speak." I submit that is not the intention of the Legislature.

There is one other submission with respect to the procedure section, but I will leave that until later. Although other issues that were discussed this morning did not deal with the issues in the same order we did, I believe we have covered the areas dealing with representation.

Mr. Preston: If I could just add a couple of things to what Ross has said, in the Child Welfare Act we have a whole system of counsel for children, we have an official guardian's panel and regularly counsel are appointed for children--it is obviously the suggested method of approach in that bill--I fail to understand the reluctance in this bill to go the same route. It is recognized in practice that counsel are being appointed for children. The OG now has some 400 cases going where they are represented. Why the reluctance to come right out and say that is the recommended approach?

I am very frightened--in my opinion, and this is purely a personal one, you should either be silent or you should come right out and say it. If you go half way, the judges always look at new bills for the intention of the Legislature and it may well be interpreted, as Ross has said, that rather than expanding the role of counsel, this is intended to restrict it to what is said in the bill.

As it is now, all we have is the Reid case of Mr. Justice Galligan and the analogies to the sources of his jurisdiction. But as soon as you have a bill that says, "Counsel can do this and counsel can do that," the courts are very likely to say that is intended to be the role of counsel. So you may be going in the wrong direction, unless you further expand the role and state your intentions right in the bill.

I cannot add anything more than that we feel very strongly on that. We are not saying in all cases, we are just saying, "Define what you mean," so that the courts are not left in any quandary about it and expand it in some cases. I cannot imagine a situation where it is intended that the child be advised by counsel and have counsel present and the counsel is not expected to make submissions. But that is the way it reads to us as a possible result.

While we are on that, I can give you the section changes we have neglected to make. On page 16, sections 37, 38 and 72 should read 30, 31 and 65. In addition, in the last paragraph, section 72 again should read 65. On page 17, right at the second last line on the page, section 72 again should read 65. On page 18, section 26 should read 19. In the third paragraph, section 79 should read 74 and section 29 should read 22.

Unless there are any questions on our position, I think we have flogged it to death. I would go back and deal with the submissions we have made regarding enforcement at this time, on page nine of our brief. I do not know whether we have given you the changes in sections here but I might as well do it in order to make it clear. On page nine, under the heading "Custody and Access--Enforcement," in the third line, section 44 should read 37. Again there are two more references to section 44 with subsections,

which should all read 37 and the appropriate subsections. At the top of page 10, 44(7) should be 37(7). In the next paragraph, section 47 should read 40, as should the next reference to section 47.

Going on to page 11, in the first sentence, item two should read section 37(6), item 3 should read section 37(2)(b), item four should read section 39(1), item five should read section 40(1), item six should read section 37(7) and item seven should read section 40(1). On page 12, half way down the page, item one should read, "Pursuant to section 47" and item two down near the bottom should read, "Pursuant to sections 41, 42, 43 and 44."

2:20 p.m.

On page 13, in the third paragraph, it should read "sections 41 to 44" and in the last sentence of that paragraph it should read, "appropriate section 42." Submission three in the last paragraph on the page should read section 43 and section 44 and again the same change in the last sentence. On page 14, where it says section 50 in the top left, it should read section 43 and under item five, it should read section 41(3).

Under the heading "Guardianship," it should refer to section 52 in the first sentence. On page 15, the second paragraph should read 54 in place of 61. Again in the heading "Submission," the same change should be made. Under the heading "Testamentary Custody and Guardianship," it should read section 62 in place of 69 and again in the heading "Submission." Those are the changes throughout so I hope we are now on the same section numbers.

Now going back to page nine on enforcement--

Mr. Chairman: Mr. Preston, I would ask you, since the clause by clause is scheduled this afternoon and a representative from Justice for Children is back for that purpose, could you more or less put it in point form because as we go clause by clause, assuming that one of you wishes to stay for that, there will be a chance to expand on particular items? Would you please deal with it point by point?

Mr. Preston: I will highlight our recommendations then.

Under enforcement, we are extremely pleased that some attempt is being made to qualify and quantify the rights of the sheriff and the police. That is one of the single most difficult areas you have today in child abduction cases. To get the assistance of the police and the sheriff requires different views and orders in different areas of the province.

Mr. Chairman: Excuse me, Mr. Preston, I am sorry to interrupt. May I point out to the committee exhibit six, the presentation of the Ontario Association of Chiefs of Police legislative committee. That deals with the sheriff and police matter. I would just point that out as we are going past.

Mr. Preston: What happens generally, for those who have not been involved in these cases, is that when there is an

abduction situation and you get a court order, there is conflict and extreme difficulty in getting the order enforced and the children returned to where the order says they should be. Unless the order specifically instructs the sheriff or the police as to their rights and powers, they are very reluctant to take steps to help you enforce your order. The police have quite often taken the position that they are involved in criminal matters, this is a civil matter, it is not within their purview and the sheriff should do it.

On the other hand, the sheriff's office is closed after five o'clock and if this is going on at night, you cannot get any help. You get a real hiatus and a real difficulty. Our view is that this bill should take the matter head on. It should do what it started out to do and provide authority to go the police and to the sheriff for help.

We are a little concerned about a couple of things. There may be some reason I am unaware of, but in section 37(6) you have a sunset provision. Kidnappings and abductions do not take place just between sunrise and sunset. Why the police cannot help you after sunset is beyond me. That is when they are most needed. I don't understand that provision and I don't think it should be in the bill.

Mr. Renwick: Just listening to what was said and glancing at the brief from the Ontario Association of Chiefs of Police, I recall a recent case involving the chief of police and a constable in Orillia. It was a matter dealing explicitly with the question of the argument, where the police failed to assist on a particular case and were charged with contempt.

Mr. Preston: Unfortunately, Mr. Epstein, who was supposed to be here, was on that case.

Mr. Renwick: Is that right? The argument was that as it was a civil matter the instructions to the police should come through the sheriff and the court held otherwise.

Mr. Preston: But different police forces in different cities have different instructions.

Mr. Renwick: Should we get a copy of that, because that was a High Court decision, wasn't it?

Mr. Preston: Yes, it was.

Mr. Renwick: Maybe this is not the appropriate place but at some point we have to deal with that question in this bill.

Mr. Preston: I don't understand, as I was saying, a sunrise-sunset provision. If there is a Supreme Court order that says the police should act, why can they not act after sundown to get the children back? Surely it is more important that the children be returned. Very often the departure from the jurisdiction is imminent. If I had an order that says the police are to help and they are getting on a plane after sunset, I am hamstrung, or they are hiding the children and going to take off

during the night. Unless you can get immediate help in these abduction cases, often the case is lost. You have to move.

Mr. G. W. Taylor: I want to try you on this: section 6 is on an entry or search referred to in subsection 5. It is not, as you have suggested, if somebody is getting on a plane one can do that. It is in reference to entry and search, which is again the premises situation, and also unless the court in the order authorizes entry in another manner or at another time. I guess that is using sunrise as sunset. I recognize that it is not the precise hours that may be more convenient as compared to the practicality in the summer where you have until nine or 9:30; in the winter time, sunset on some days is about five or 5:15.

Mr. Preston: But it throws doubt on to what they can do.

Mr. G. W. Taylor: It throws doubt on to the timing but not into what they can do, because five o'clock on a Friday night or a Thursday night might be a very precise time when a search and seizure would be worth while. I guess you have to think of the participants and what could come out of situations which always have different ramifications after dark than before dark. That is the reason and the background between setting a sunrise-sunset feature as compared to timing.

Mr. Preston: In my experience these things usually take place in the evenings. Sometimes it is during the day, but it is usually when the kids come home from school and getting on into the evening.

I agree it is referring to entry and search, but often the only way you can find the children is using the entry and search methods. The police are very reluctant to get into these things. I have had a couple of cases where the police have had an order actually directing them to do things and the police officer has phoned my office and said: "You better come up here. The clients are in the police station." They won't do anything until I come and explain it to them. I can see them sitting on these things and saying: "All right, it is sundown now. We can't do anything until tomorrow. Let cooler heads prevail."

The children get moved. The people move around with the children. They hide them. They take them to relatives. They do anything. If you are going to find the children, you have to find them instantly. Daylight or darkness should not make a difference in putting an end to this, and the whole thrust of the act is to assist the courts to put an end to these things.

Mr. Spensieri: Or if the police are conscientious then they have to stand there and guard the house all night to make sure there is no change in the status quo.

Mr. Preston: The search and entry is to assist--we are not talking about affecting the property rights, we are talking about finding the children. If the court has already given an order based on the best interests, which the order is supposed to be, then everything else should be subjected to the best interests of those children. The best interests of those children is to be acted

upon immediately and returned in accordance with the order. I cannot see how the fact that the sun coming up or going down makes any difference to that for these purposes.

I can understand that if it is a property rights situation, all right there are times to do it. But for children I do not understand how there is the same time structures. I cannot make it any clearer than that. It does not go by the clock. Child abductions do not go by the clock or they do not go by the sun, they go emotion.

2:30 p.m.

Mr. G. W. Taylor: If you are looking at one situation where the child is in custody or in the care of one individual, the search and seizure--and I guess we all of the situations that flow out of darkness, the apprehension of the different parties as a result of darkness, one could set a time limit on it. It may come to mind that seven o'clock may be an adequate time frame. You have the problems of enforcement; those enforcement people who want to enforce it during particular hours that affect the safety of all participants, even the child who could be removed from the home at an odd hour, at an hour that may not be for the best interests of that child. Indeed it is putting on the applicant to make sure to the court and explain to the court why you want more than a search and entry order during other than these hours. So again it puts it upon the applicant.

I recognize there will be situations where the request may cause some difficulty to the applicants. But it is considered that the court, hearing the evidence, hearing the information will make the change in the hours in accordance with the information provided.

Mr. Preston: I can envisage it being a complete rubber stamp because you have to read this section as it is intended. The reference in section 6 is back to subsection 5, which is the search and seizure. Subsection 5 is back to subsection 2. So we are really talking, when the sunset provisions come in, to subsection 2 situations.

Those are urgent situations. Where the person is unlawfully withholding the child, where a person who is prohibited by court order or separation agreement from removing the child from Ontario proposes to remove the child, where there is a person entitled to access and it is proposed the child be removed and not likely returned, those are all urgent situations. None of those go by sunrise and sundown. None of those are normal situations.

If this was just a general situation, I would agree with you, it should be in the normalcy. But this whole section of the bill is to do with police powers in urgent situations. I cannot envision a judge making an order under subsection 2 and the lawyer asking for the clause relating to the sheriff or police without him going further and saying, "And please put in 'any time' because I do not know when I am going to find them." The judge will do that in every event. I cannot envision him not putting it in, because it is only in urgent situations that this comes into effect. If it is urgent, surely it applies at any time.

The people it is impinging upon, where the search and entry is going to be made, are already, in the view of the court, doing something wrong because they are unlawfully withholding or they are intending to breach some order of the court in doing it. So you do not have to protect them, because the court has already found that they don't need the protection, they need to have something enforced against them. So if you read this section with that view, I cannot see the validity of section 6 in that narrow interpretation.

Mr. G. W. Taylor: As I mentioned, it is a cautionary section. The person enforcing the order, be it the sheriff or the police, have their instructions by statute and the order itself will so specify when they can do it. So it is just a cautionary one when you are seeking out the order that you will seek out the extra, if you want, as it sometimes been criticized, writ of assistance or going in at any particular time or any time, any place, anywhere. This is precisely setting out the grounds and the times when one can achieve that assistance by entry and search.

Mr. Preston: Shouldn't the caution be whether the order be made at all, not the time of the order? Shouldn't the caution properly be you have to satisfy the court that you need the order under section 2? Why does there need to be a further caution as to time? If you have had to convince the court that this child is in some kind of danger to get the order requiring the police assistance, that is the caution. Why do you need a further precaution about time?

Mr. G. W. Taylor: I am sure if we left it open to just an order, you could have then on such terms and conditions as the judge so sees fit, but in this situation the drafters and the Attorney General felt this is a caution based on their experience that in the best interests of the child those are the hours best suited to extract the entry and search.

Mr. Preston: All I can say is we come down to a philosophical difference and in practice this is hamstringing counsel if they have to say to the court, "We think they are going to do something after sunset." Often you do not know, you just know the kids have disappeared. I can only recite cases which I have had where, in the dark of the night, children are being moved from place to place, and as we are going in the front door with the police, they are going out the back door. I have gone so far as to have to get the American customs to stop cars at the border.

It all takes place at midnight, and I do not have a court order in that urgent situation. Maybe I have an order that says to get the kids, and I find them. Do I have to go back to court and say, "I have found them, but it is after sundown; give me an order." How do I protect them? In those cases, those children are over the border and they are in Jamaica or they are anywhere, and you cannot stop it. You can only stop it if you have the police at all times.

Mr. Laughren: Is the reason it is between sunup and sundown, when everything is nice and civilized, that they wanted

the order to take effect between sunup and sundown to avoid any kind of cowboy techniques in the whole process? But would that not be accomplished just as well by having some kind of wording which said that the order should take place between sunup and sundown and if it occurs at other times, it must be justified? Is that putting the onus on the wrong party?

Mr. Preston: In the particular situation of section 37, we are no longer involved with Mr. Nice Guy. We are no longer involved with the niceties, because subsection 2--I can only repeat it--is for someone who is already breaching an order. You are already into the conflict and when you are in the conflict, they are behaving not in the best interests of the child, but in their own best interests.

I do not mind a sunup-sunset provision if it says an order for access can only be enforced by the police in normal circumstances between sunrise and sundown, et cetera, but when you have got abduction--and this whole section is aimed at abduction--then the niceties are gone. I do not find that this section adds anything to the thrust of the bill, that is all.

Mr. Chairman: Excuse me. We are taking too long. Do remember there were one or two others who said that. If I am not mistaken, it was probably Ms. Lackovic, who is here, who also said that yesterday. She said, "Urgency is everything." If it was not in her brief, it was in one of the others. So we have had some of these points before. If you would keep this in mind and remember we will have a chance to go at them again. So, we must press on.

Mr. Preston: Okay. Under the enforcement, the other major section that we have some comments on--there are other comments, but the other one would be as regards section 40, the information--enforcement is everything in a custody case. It is no good getting an order which you cannot enforce. That is all too often the situation. It is all too often that you cannot get the necessary information.

The thrust of section 40 is that you can get records, but section 40 could go further and say you can get information. Often there is no written record, but people have information in their minds. We think that section 40 should say that if you have got information, you can be compelled to give it up, not just your records, but the information you have. It is just a logical extension of the intention of section 40.

That would end our comments on enforcement and move us on into the extraprovincial matters which we find very important and very crucial. Mr. Davis will make some comments on that.

Mr. Davis: I will restrict my comments in this area to one observation, if I can put it that way. Section 47 enacts the Hague convention, and that is something the committee wanted to specifically endorse and that recommendation was made in the last brief. However, what enacting the Hague convention does is it creates a double standard. For people who are coming in under the convention from another country, for instance, they have to prove only they will have their orders enforced unless two criteria are

met: one being that the person who had custody was not actually exercising custody rights at the time, or there is a substantial risk that the return would expose the child to physical or psychological harm.

2:40 p.m.

For those people who are applying from British Columbia, section 42 is the applicable section. There is a different regime set up for other provinces. A proposal we made the last time was instead of saying the applicant will have to show that the order was properly granted, the onus has been reversed in this case and the section says that, unless the contrary can be shown, the order is going to be granted.

That is a very valid change. But what I fail to see is why the government would not enact the same standard for people who are applying from other countries as they would enact for people applying from other provinces. The act of removing a child from a jurisdiction is wrongfully portrayed by some people. I think there is a brief that the Canadian Bar Association, criminal branch, put forward saying they were worried about the rights of people involved in kidnapping situations, but the removal of a child to another jurisdiction is not the sort of thing which can be endorsed in any form.

Generally, it is an aggressive act against a custodial spouse and unless there is a removal of safe havens for all people who are engaged in kidnapping or abduction of children, you will not be able to correct the problem at all.

As I say, I endorse the fact that the government bill does say that in most cases those orders are going to be enforced, but the Hague convention is, I submit, the best test. It is the simplest test. It is the most straightforward test. It says generally we will assume these custody orders were properly granted and we are not going to go behind those orders.

That gives a foreign order, an order in Holland or any of the other signatories to the Hague convention, a better leg up than an order in BC. In BC, if you can show that some of these other criteria apply, you may be able to squeak through and have the court review the order. I do not believe that the Legislature intended to give the applicant from BC fewer rights than a foreign applicant, or an applicant from a different country. That is the cut and thrust of the submission on that particular section.

There is confusion in the minds of the people on the committee as to why sections 43 and 44 were not combined as one, but perhaps that is something which can be dealt with in a clause by clause analysis.

Mr. Preston: Can I just add something to that? The Hague convention has been coming for a long time, but there are no signatories to speak of. There are three countries, or maybe four now, that are signatories to the Hague convention. It is in here and it is a major part of the bill and it is going to be a growing part of the bill. Right now, we really are not involved with many

Hague jurisdictions. We are really involved with the other jurisdictions.

But we agree that it is a giant step forward to take the Hague convention and all we say is, "Take the Hague convention, adapt the wording of the Hague convention to the bill and put it in, saying, 'We are a Hague jurisdiction and the same criteria apply whether or not you are a signatory to the Hague convention.'" That is the thrust of our bill. If the government does not want to go that far, then our clause by clause submissions will show changes that we recommend to at least clarify the discrepancies which we find.

There is one other point under this and that is found on page 14. We think there should be a central registry of custody orders, as there is a central registry for divorce applications. Part of the problem is that you can jurisdiction shop or you might apply in two or three different places in Ontario. We think that if there was some kind of central registry system for custody orders--we have run into this problem--you would get rid of the problem of two parents each getting an order from a different judge in a different jurisdiction on the question of paramountcy.

When you start a divorce application at this time, a copy of the application is sent down to the central registry for divorce applications and it can only proceed if there have been no prior applications or orders. We think that a similar kind of situation should exist for a registry for custody orders. It would enable the police, for instance, if they are presented with an order that they are required to enforce, to check to make sure that is the order which is in existence and it has not been superseded or that there is not a conflicting order. We think that is essential because there is some shopping for jurisdictions.

As far as guardianship is concerned, we feel--although I haven't read it--the better qualified brief would be that of the wills and trust section. I will be very frank. I have never really understood the guardianship aspects and we would bow to their submission.

We did make some prior recommendations regarding guardianship and most of those have been picked up so I can't deal any more with that. That applies to both guardianship and the testamentary custody in guardianship submissions. Representation of children we have dealt with. I would expect the complementary amendments recommendations have been picked up as well. That has been picked up? So that would end our recommendations in so far as the bill is concerned subject to the clause-by-clause comments.

Mr. G. W. Taylor: I wanted to make one comment on your recommendation as to section 42 in regard to your belief--Mr. Beecroft will explain that more fully--about the Hague features. There was a suggestion made yesterday we should put the two together. Yesterday it was suggested that the two be split in that there should be provisions for orders made within the jurisdictions of Canada and another section to deal with orders made outside the jurisdiction of the provinces of Canada.

Again, you come with two philosophies in two days as to the approach given the present, existing wording of section 42. Section 42 is set out and we are in effect saying for those extraprovincial tribunals, all of them, both inside Canada and jurisdictions to which the Hague will apply and other ones, that there is a basic presumption of their regularity and enforcement subject to a few givens here under subsections (a), (b), (c) and (d), where I think they are regarded as pretty well having axiomatically taken place in the jurisdiction of the order.

They are pretty well features that would take place in all orders except one might say it was started with a substitutional service and: "Although that is a given type of service and a type of notice, I never did receive notice. Therefore, there is a failing."

It gives an opportunity to state a failing in a particular order but there is this presumption under section 42, and if you combine that with the wording of section 46, without requiring the form of proof, a court can take notice of a law without the usual procedure and still is the same by calling a person committed and knowledgeable of the law, an expert on foreign jurisdictions, so there is this presumption, if you can show there has been service, an opportunity to be heard, the best interests of the child, et cetera, and policy. You can then put in your order and have it enforced without duplication and proliferation of litigation, particularly in regard to children.

The other feature, continuing on with that, in regard to a central registry, is that today, with modern computers and all that, it is being looked at by different jurisdictions. It may have a possibility of coming in the future. At present, there is capability.

I know the system in the divorce situation. The divorces are fewer in number than custody but there could be an identical number. It is also to prevent duplication, but one might say in that situation the principal feature is to prevent duplication of divorce as compared to duplication of the other corollary pieces of relief.

In this situation you may only be going for the custody. To the swift may be the remedy. If we had something that prevented a remedy from being available to one of the participants in another jurisdiction, if you designed a central registry--I know it may have some merits but I put forth this argument to you--if you have an initiated here and made out your case in a jurisdiction, there may be just as legitimate reasons for its being commenced and, even more so, in a form more convenient.

2:50 p.m.

If you put in a section that once commenced here without anything further rather than just a registry, that an application has been started, you may lose some remedies in, say, Ontario or some other jurisdiction. I just put that forward as an explanation as to why at this point, its monetary one, its practical

prohibitions against putting it forward. It has been recommended by other individuals before you made your presentation.

Mr. Preston: If I can respond in the reverse order, so far as the central registry is concerned, first of all, with divorce, the central registry for divorce is Canada-wide and it seems to work albeit slowly. What I am really concerned is that the police are always saying: "Is this the most up-to-date order? Are there other custody orders outstanding? Has it been varied?"

If, within Ontario and merely within Ontario, at the inception we had a central custody registry, then there is some access in any given family for the police to know what is the most up-to-date order and what is outstanding. Ideally, of course, then you could extend it to other jurisdictions with some other thing but within Ontario certainly it's feasible and far less expensive. If they can do it for divorce throughout Canada, surely we can do something similar just within Ontario.

I am not saying that it has any overriding authority but it is an informational thing. These orders are all entered in any event. If you obtain an order it must be entered in the court. It is merely a matter of finding some transmittal and central gathering of them, because when you obtain an order it must be entered and it is photocopied and records are made. Then, if there must be some further step to put them altogether, there is some way of finding out these things.

Vis-à-vis a recommendation that the foreign jurisdictions be separate from the provincial jurisdictions, I frankly don't understand that. I don't draw any distinction between an order of Manitoba and an order of Michigan or an order of Holland.

Mr. Renwick: I am not certain but I thought the sections that they thought could be combined were 43 and 44.

Mr. Preston: That's correct. I was going to raise that point.

Mr. Renwick: Yes, 43 and 44; we are talking about the two are superseding. It didn't have anything to do with this question of splitting 42. The reason I wanted, at least in the first instance, to split 42 into Canadian extraprovincial territorial orders is to try to get full faith and credit at least for those on an automatic basis.

Mr. Preston: You support our Hague position then?

Mr. Renwick: Yes. But it seemed to me that the difficulties which have occurred so far in getting recognition simply on a full faith and credit basis for extraprovincial orders of other provinces and not the territories, suggested that it is a very practical matter. At least we could start there.

Mr. Preston: Yes, I agree.

Mr. Renwick: That's why I thought that by doing that we would go a long way to cut down the ambit of section 42 by having

those provisions deal only with those extraprovincial orders which were non-Canadian orders. Then, I thought the supersession provisions would be good and appropriate ones to deal with non-Canadian orders so that you are not challenging an order; you are moving to get the best care of the child under sections 43 and 44.

That was my reason for it, that in a perfect system with all the countries abiding by the Hague convention and everybody accepting all those rules, you should give full faith and credit, presumably to everybody, but that isn't going to happen. I was sick and tired of arguments with respect to BC or Alberta or Quebec or Newfoundland orders and really having a rehearing in Ontario.

Mr. Preston: It happens too often. We don't want to be like Alberta where they consider Alberta to be a haven for these things. That's the last thing you want. You want some certainty and you want to be able to tell your client: "No, you don't stand a chance here. They will uphold that order." We can't say that our system is the best and therefore it should always be reviewed here. We have to put some faith in other jurisdictions being able to devise their own rules which are appropriate to those children in those jurisdictions.

Mr. Renwick: I just wanted to explain why I wanted to split the non-Canadian and Canadian extraprovincial orders.

Mr. Preston: In any event, I think that ends our brief and I certainly would like to thank the committee. We've been probably overly long but we find that from our point of view it is an extremely important bill and we do appreciate an opportunity of being heard.

Mr. Chairman: Good. Thank you very much.

I will thank you, you have finished your formal presentation, Messrs. Preston and Davis, and again the Canadian Bar Association for its assistance in providing you people here, under the umbrella of the CBA, the same as they did last week with us in the company law bill and the same as they did yesterday under the wills and trust section. I think it is fair to say that if we hadn't had the Canadian Bar Association specialist technicians available, we would not have got through last week. So I thank you.

We are going to start clause by clause. We have Mrs. Lackovic and Mr. John Kennewell, who is with Justice for Children. Mrs. Lackovic is with the Abducted Children's Rights of Canada. The members might wish to ask you questions or ask your opinions as to various matters as we go through the clauses. Shall we commence?

Mr. Elston: Mr. Chairman, we have an amendment that we are preparing. It's not available at this point. We weren't sure exactly how soon we were getting to the clause-by-clause, but there will be one.

Mr. Chairman: What section is it on?

Mr. Spensieri: I might say, Mr. Chairman, it involves the

interpretation section 18 by the addition of certain other definitions, so I would ask that 18 to 21 inclusive be stood down for consideration, if it's possible.

Mr. G. W. Taylor: If I can assist the chairman in this matter, if there any amendments coming from the different individuals and members I would ask that they present them in the usual order, and subject to the chairman's and committee's disposition, we can stand the different sections down where somebody wants an amendment and we can make both legislative counsel and the staff of the Attorney General (Mr. McMurtry) available to assist you in the wording of them. It may be that in your wording and definitions you may want to go in a different philosophical direction than the present legislation. It would be just for the assistance of wording that you might be proposing rather than direction, so I will offer you the assistance of these individuals in that respect, to ease the work load of preparing the amendments.

Mr. Renwick: Mr. Chairman, I am not pretending to be up to date, but I have two amendments here. One of them--I don't care where it goes--deals with that question of representation and the other one deals with what I guess colloquially has been referred to as the emancipated child.

The emancipated child one, it seems to me, would most appropriately come in section 24. The representation one, I think, could go in any number of places, but probably either as a separate section someplace, or else somewhere towards the end of the bill in that section which deals with it. I have no pride about location. I just refer to it as a new section. There is no magic in the wording of it.

3 p.m.

Mr. Chairman: I will let you put it in the right place and if you forget, then you are out of luck.

Mr. Renwick: Then you will put it in.

Mr. Elston: It may come down to the fact that, as with the last bill we dealt with, one particular member who had no pride as to location did not find a location at all.

Mr. Laughren: You would not support it.

Mr. Elston: It remained in limbo.

Mr. Renwick: I moved the same amendment here but it may be out of order here.

Mr. Chairman: Let's carry section 18 under part III. I cannot carry section 1 because that includes all of what comes thereafter.

Mr. Renwick: Section 1 will come at the end.

Mr. Chairman: Yes, that is correct. Shall we stand down 18 to 21, inclusive?

Mr. Renwick: Why are we standing down 18 to 21?

Mr. Chairman: Because Mr. Spensieri is having amendments typed.

Mr. Renwick: I do not mind standing them down, but would it not be helpful for us to go through each of the sections and stand them down so that all of the points could be raised now in case the minister and his advisers are in a flexible mood. I would not want to catch them tomorrow morning when they might feel otherwise.

Mr. Chairman: Mr. Spensieri is getting an amendment typed.

Mr. Renwick: Just highlight the points that are of concern to the members of the committee, and then stand it down.

Mr. Chairman: Does that meet with the committee's approval?

Mr. Laughren: We are very flexible.

Mr. Chairman: I direct the members of the committee to section 18, your interpretation section. I believe that is what Mr. Spensieri is addressing himself to. The purpose of section 19 is custody and access.

Mr. Spensieri, the definition or interpretation you wish to add to section 18, does it affect also 19, 20 and 21?

Mr. Spensieri: As a matter of concordance, Mr. Chairman, it would affect the act throughout. That is why we are having a little difficulty in preparing the formal amendment in written form. Perhaps we could just propose the amendment in principle, subject to working out the concordance and the sections which are affected as we go through the clause-by-clause.

Mr. Chairman: Would you put that in four-letter words for me?

Mr. Spensieri: I think the concept we wanted to introduce was the definition of, as has been suggested, separation agreement, child, and then the concept of an older child. The older child would be defined in a way that would later on have to be reflected in the various sections, such as being a party to proceedings, right to counsel, et cetera. So it would really affect the act substantially throughout. I would be content at this point simply to say that we would be introducing a definition of "older child" and then the consequences which flow from that definition we could discuss as we come to each particular clause.

Mr. Chairman: It is going to be a little difficult to proceed with consideration of the passage of various clauses when we may be going back to the "older child" definition. According to some of the conversations, it might perhaps be a person 10 years

old or more, and it may make a difference to various clauses. I am hesitant to carry on and start passing various clauses.

Mr. Elston: I suppose we can run the concept by at this stage. So far, unless there is a real change of attitude, it is going to be difficult to have that pass as an amendment. Perhaps we should run it by in the interpretation section at this point and then if it is passed, we can worry about the necessary follow-up changes to the other sections later on.

Mr. Chairman: Fine.

Mr. Laughren: --your persuasive powers.

Mr. Elston: Mr. Renwick, as persuasive as he has been on occasion, has also had some difficulty in persuading, shall we say, the masses. Perhaps we should look at it from their point of view. The practical aspects of it are that if the concept of older child is not adopted as a part of the interpretation section, the rest of the difficulties will disappear.

Mr. Chairman: Has the ministry some comment to make about the philosophy of the older child that was used? I believe there was reference to "tender years" and "nontender years" et cetera. Could you speak to that, Mr. Taylor?

Mr. G. W. Taylor: Yes. On behalf of the Attorney General, the interpretation of "child" as it is at present in the act is not subject to amendment. We mentioned earlier that the older child was considered as a possibility, referring to the Child Welfare Act where there is a definition of child for purposes of the child being able to instruct a solicitor. The time frame there is age 10.

There it was considered that a solicitor be appointed for a child, or that the child is able to have a solicitor, because in effect the state is intervening in a relationship, whereas in this one the state is not intervening. It is a situation where the two parents, or somebody having some relationship, are seeking custody or access. Therefore, they are the prime participants in it. We do not want a third or any additional number of litigious persons involved. Depending on the number of children in a situation, there would be proliferation of counsel, one for each child or group counsel.

There is provision at present, an acknowledgement that there are situations where children may have a solicitor appointed. But at this point the ministry and the government are not in a position to extend the opportunity for solicitors to be appointed for children of different ages except in the specific circumstances that may occur as a hearing is proceeding. They will bear with the statute as it is at present, watch it unfold, watch its history to see whether or not there should be an extension of the present definitions in the future.

Mr. Chairman: What comments do you have on that, Mr. Spensieri?

Mr. Spensieri: The two major exhibits which are before

us, those of Justice for Children and the Canadian Bar Association, seem to point to a need for greater definitions in the interpretation section. Specifically they have mentioned the need to define the word "child." They have been kind enough to provide us with a rather exhaustive definition, which has been taken from the other sections of the Family Law Reform Act.

They have also pointed out a need to define the term, "separation agreement." From the Justice for Children exhibit, I got the drift that they had intended to provide special remedies and special substantive rights for an older child being defined as a person who not only has achieved a certain chronological age but who is found, on an objective basis, to be able to instruct counsel and to make his views felt in these very important proceedings of custody and access.

3:10 p.m.

We would like to introduce in the definition section appropriate definitions of the three concepts, "child," "older child" and "separation agreement." The consequences which will follow from those definitions will, of course, be in the crucial areas of permitting an older child to be a party to proceedings, to initiate proceedings, to receive notices of various proceedings and therefore to confer on the older child, as loosely defined--and I regret that we did not provide a more formal definition--to provide to such an older child the opportunity for participation in these two very important fields. So, I would urge the members of the committee to consider tightening up the interpretation section by adding these three additional definitions.

Mr. Chairman: Does the parliamentary assistant have any comment to make with regard to the definition of separation agreement as Mr. Spensieri has outlined it?

Mr. G. W. Taylor: Yes. I have heard it said today by different witnesses before the committee that there is a proliferation of Ontario statutes and that one must put on the desk a proliferation of books to arrive at an interpretation, particularly if they are not all in the same books.

There is a definition of "separation agreement" under one particular statute. We felt, without reiterating it in this particular statute, that it is a common and well understood term without giving it further or expanded definition. The advisers of the Ministry of the Attorney General are satisfied with the separation agreement definition, such as is available in the present statutes of Ontario.

Mr. Chairman: Where does that leave us? Mr. Renwick, I see you frowning. I see a question coming.

Mr. Renwick: I have two comments. I think the point Mr. Spensieri raised seems to be best dealt with through a question of representation rather than through attempting to divide children into different age categories. I think I understand the problems which he is trying to get to and find answers for, and I think I understand the weight of the submission of Justice for Children in

exhibit one. I would be anxious to see the amendment if Mr. Spensieri decides to put it in tomorrow, but until then I think I would withhold judgement on it.

Does separation agreement appear in only one place in the bill, or in how many places does it appear? It is my sense that it only appears in the one place.

Mr. G. W. Taylor: Section 20(4).

Mr. Renwick: I don't recall seeing it anywhere else.

Mr. Preston: Section 20(7) as well.

Mr. G. W. Taylor: Section 20(7), yes.

Mr. Renwick: Yes, but that is the only place. It is only in section 20 that it appears.

Mr. G. W. Taylor: Section 22(2) (b).

Mr. Renwick: Yes.

Mr. G. W. Taylor: It is not such a proliferation that one cannot define it as it is in the particular statute where it is now defined. That is the feeling of the ministry.

Mr. Renwick: It is not defined elsewhere in the Children's Law Reform Act?

Mr. G. W. Taylor: No, it is not. It is the Family Law Reform Act where it is defined. I think it is even difficult to practise the one phase of this law. You are always going to be referring to those other statutes, be they the federal Divorce Act, the Family Law Reform Act or this act. It is not like it is hidden away in another piece of legislation that is not familiar to those people practising in this field of the law.

Mr. Renwick: My response on the separation agreement is that if you are talking about suspending the rights of one of the parents if there is not a separation agreement, then the event which triggers that suspension should be clear. If we do not define separation agreement as it is defined elsewhere, then we run into the situation that any agreement which purports to provide for the separation of the spouses would be a sufficient event to claim a restoration of parental rights by the lifting of the suspension. I would think that it would be wise to put in the definition of separation agreement.

Mr. Elston: One of the reasons we want to be sure our interpretation section is more complete than it is now is the fact we are addressing particular concerns by this piece of legislation. We really ought to define our terms in the areas within which we are operating in the context of this particular legislation and not try and borrow the concepts which were developed in other pieces of legislation where the thrusts were towards other problems.

When we are dealing with the particular concerns of this

legislation, it is an aid to people to know exactly how the definitions are worked and reworked. It also helps when it comes to interpreting what they are to do with these various pieces or instruments of their profession.

Often, when we take something from another piece of legislation, we have to look at how it has been interpreted under those acts and they are sometimes viewed when interpreted in the context of that whole act, which is actually foreign to the problems we are getting at in particular legislation. I am really persuaded by the representatives from the family law section of the Canadian Bar Association that we really ought to complete this interpretive section in the context of this legislation and not merely borrow bits and pieces from other places. It is not only handy but it is probably something that should be done.

We have done it already with the bill that we considered last week. We completed our sections for definition purposes as far as possible without reference to any other legislation. We made that piece of legislation stand on its own and I think we ought to do the same with this. That would mean we should get into the definitions of separation agreement and child. The question of whether an older child be included or not is another concern, but I think we ought to round out that section.

Mr. MacQuarrie: Mr. Chairman, if I could direct a question to the representatives of the ministry: Is there any compelling reason why a definition of separation agreement shouldn't be included in the statute? It would seem to me that so far as possible when there is a possibility of confusion, a statute--

Mr. Chairman: Excuse me, Mr. MacQuarrie. I apologize for interrupting you. I think the parliamentary assistant can cut through here as he is in an agreeing mood.

Mr. G. W. Taylor: It was the persuasiveness of your argument sir, just by you starting this argument, that I have concluded that it is possible we could include in the definition section under section 18, the amendment that a separation agreement would be so defined the same as in the Family Law Reform Act. Just add that in so that when we are talking about a separation agreement it will be the same as under the terms of the Family Law Reform Act. It has the same meaning and significance, and hopefully it will not in the definition there be less of a document than what has been termed here in separation agreement. I would make those submissions and the amendment.

Mr. Chairman: Perhaps the legislative clerk, with the clerk, could work ahead with that and we will carry on.

3:20 p.m.

Mr. Elston: I wonder, would he be as flexible with the concept of including a definition of child, working one step further. As was indicated, that is the whole focus of this legislation.

Mr. G. W. Taylor: While the mood is there, it does not extend to that extent at this time. If we could leave it at that point of the separation agreement.

Mr. Chairman: That will be going in section 18. Is there any reason we can't deal with purposes, stand down section 18 and deal with section 19?

Mr. Renwick: If I could just make one point I want to make on section 18 before you stand it down, it is that if there was any wisdom in the suggestion I made that we split the extraprovincial tribunals I think a simple way to do it would be to define a Canadian extraprovincial tribunal and a non-Canadian extraprovincial tribunal. It would be a simple way of doing it if it made sense in this imperfect world to provide for full faith and credit for orders of Canadian extraprovincial tribunals, but not for non-Canadian extraprovincial tribunals.

Mr. Chairman: Mr. Parliamentary Assistant, would you reply to that?

Mr. G. W. Taylor: On the suggestion by Mr. Renwick, I would suggest that be put down until we come to that section. If we can't meet that section, being 42 or 43, we will come back to that.

Mr. Renwick: I just wanted to suggest that might be one possible dichotomy to provide.

Mr. Chairman: We are standing down section 18.

Mr. Elston: I have had a couple of concerns expressed to me about the construction of the definition for "separation agreement." It might be of some assistance, while we are working on some wording, if they could get together with members of the family law section of the Canadian Bar Association to work out the wording because it may not be workable.

Mr. Preston: If I could make a comment, if you just refer to the definition you say in here, "'Separation agreement' means the same as defined under the Family Law Reform Act," it will not work. The separation agreement as defined under the Family Law Reform Act is, "'Separation agreement' means an agreement entered into under section 53." Section 53 talks about people who are cohabiting, or living separate and apart, and talks about ownership of property, support obligations, the right to direct education, moral training of children and right to custody and access, but it doesn't deal with formalities of an agreement. The formalities of agreement are arrived at in a different fashion. That refers to domestic contracts, one of which is a separation agreement.

If you just refer to separation agreement as defined under the Family Law Reform Act you won't get there because you will miss out all the formal requirements. That is why we say it should be defined here, rather than a reference out to someplace else. You will get incredibly convoluted.

Mr. G. W. Taylor: That was the consideration I had expressed to you in suggesting that it be defined in another

document. As the general words may indicate, separation agreement as it at present is set out in the Children's Law Reform Act, may be in their wording larger or more encompassing than restricting it to a definition in another statute, which was the intention of the bill. The intention of the bill was to restrict it to what is known as a separation agreement in another statute, but it wasn't specifically referred to, primarily because of what you just said.

There are more things in a separation agreement or a family domestic contract than you could deal with in a children's custody and access situation. One is tampering with the other and that is why, without a definition, you would look to the general law, common law or other areas as to what would be a separation agreement.

Mr. Preston: The only difficulty with that is that under section 20(4) you have provision where there is a suspension of one party's rights unless there is a separation agreement.

Mr. Renwick: Otherwise provided.

Mr. Preston: That is right. I mean, you are intending by that to define somebody's rights without having to have recourse to the courts; but if you have to have recourse to the courts, to the common law to see whether that separation agreement you referred to is valid or not valid, then you are inviting litigation in any event.

If you define "separation agreement" under the act, then you know what separation agreement means under section 20(4). If you are intending to avoid litigation by section 20(4) and yet you do not tell us what "separation agreement" means, then I am going to take it to court to say it is not a separation agreement. But that is not what your intention is.

I see no problem with just saying "separation agreement" and putting in the formal requirements that you provided for domestic contract under the Family Law Reform Act. At least then we will be saying, "It has to be signed by two people and it has to be witnessed." It will have formal requirements of some kind. You can have an oral separation agreement in common law.

Mr. Renwick: One other possible solution is to get away from the term of art "separation agreement" and in this provision simply say, "Until an agreement between the parents otherwise provides," and then provide what an agreement, and presumably it would have to be in writing, "otherwise provides," in order to avoid any suggestion that what we are talking about here is the specific definition that is set out in the Family Law Reform Act, or that it is some particular term of art.

What we are saying here is that, until they get around to setting down in writing the arrangements for the custody and incidence of custody, until that event happens, and that is all that need happen, the rights of the one parent are suspended.

Mr. Chairman: We are having our troubles with section 18. Shall we continue to stand them down?

Mr. G. W. Taylor: I was going to comment, though, to Mr. Renwick, and I guess to my colleagues and those people present as witnesses, that the present statute is one that is trying to codify some principles, recognize some principles, but yet not get into such a detailed listing that one may, by listing them all, say you have excluded those that are not listed, which is drafting.

When you talk about constitutions or you talk about this statute or any statute, you are going to run into considerable difficulty as each section comes up if you get into the situation, "Well, you haven't listed it, therefore it is excluded, and therefore we must list it," or "This is the direction we must give counsel." I just offer that as a general comment, because some of the briefs and some of the suggestions have been designed that way, and we have already seen it with regard to the separation agreement. If it's in there in general terms, a separation agreement, and there is a certain body of law that can define that for solicitors; there may be situations where somebody is going to contest that a specific document is not a separation agreement.

I think the principle of the bill and the drafters of it would rather say, "Well, let that situation occur, as compared to all the others where there are the normal components of a separation agreement and we understand those." They felt similarly about other definitions throughout, that rather than specifying this is what a separation agreement is, then somebody is going to say, "Because you are not in the definition, without these rules it may come about you are excluded."

So I put that piece of information before you, because I see the direction of some of the briefs and some of the information, and the route we are going. The leeway provided to me as parliamentary assistant and that which the Attorney General desires, is not as great as it is presently projected by some of these definitions, as he has seen it, his staff have seen it, and the previous briefs and information in drafting such a document.

Mr. Preston: Can I make a comment on that? As we understood it in the bar, there were three very progressive pieces of legislation that were a package: the Succession Law Reform Act, the Family Law Reform Act, and the Children's Law Reform Act. They were all presented as if they were going to be a great step forward, and you put an interim provision in the Family Law Reform Act--one line dealt with custody and access--because you were coming forth with this piece of legislation.

3:30 p.m.

This is the only opportunity we have to have any input. We don't have an opportunity to have input into the philosophy of it in the earlier stage before you get instruction or into the early drafting, but when we see this bill as being part of the package we can only approach it by saying: "If it's intended to be this great new package let's make it as great and new as we can and let's not treat it as a stopgap again. Let's do it now."

That's the problem we have, and we're coming at a very late

stage of the thing after second reading. Maybe our input should have been earlier, but we're stuck with what we have and that's why we take this approach. We don't want to be strident, but when legislation gets in it's far harder to change it than before it gets in. If the changes are going to be made we can only suggest that we make them now. What we don't understand is that we did this in Bill 140, and that was quite some time ago. The same recommendations were made and the same problems were put forth. The Attorney General's department had an opportunity then to go back and rethink it and they didn't. But we still have the same position.

Mr. Elston: These people are in much the same position as the representatives from the Canadian Bar Association companies branch or corporations branch were last week. In other words, they are representatives of the technicians, if you will, the people who have to make this legislation work in practice. That's why I find a lot of their suggestions particularly persuasive, and I really do think we have an obligation to them to make this work as well as we can and to make it stand on its own. It may require some time at least to address some of the questions they have raised and which have been raised here, and perhaps that will also give us some time to get our amendments together for section 18 so we can start afresh. Perhaps it's the type of thing where we should have an overnight shutdown so we can start fresh in the morning. I don't know.

Mr. Chairman: Do you mean a shutdown on everything?

Mr. Elston: Yes. Right now, if that would allow everybody ample time to consider the suggestions that are being made. When they are being made by the people who have to make them work and who are working with them every day they ought to be very seriously considered and addressed before we report the bill.

Mr. Chairman: Mr. Elston, you have heard the parliamentary assistant and his comments with respect to Mr. Spensieri's philosophy, and it would be a shame to shut down, as you say, only to gain nothing by the loss of time.

Mr. Elston: I appreciate that. I guess it just concerns me somewhat that last week's legislation in large part originated with the very people who are responsible day to day for carrying out the practice, and here we have an organization representing those practitioners in this field of the law that we are dealing with in this committee now whose input has been put off until now and the real concern they are expressing.

Mr. Chairman: That's not necessarily so.

Mr. Renwick: Their input has not been put off until now. My God, it goes back to 1968. The law reform commission was fooling around with all of this.

Mr. Chairman: There has been input, as Mr. Renwick said.

Mr. Renwick: If they had wanted to take any initiative they could have easily had some input into the matter.

Mr. Elston: Let's put it this way: The same concerns that existed in December 1980 still exist now with the people who are responsible for practising in this area of the law. That's what I meant to address to you. I didn't mean--

Mr. G. W. Taylor: Some of those are correct; some are errors.

Mr. Renwick: I am not arguing against what Mr. Elston says. All I am saying is that I think that by standing it down we don't necessarily get clarification of what everybody means, because the progression with the term "separation agreement" has been a request in the submission from the bar that we define "separation agreement," an agreement by the parliamentary assistant to define it and a reference to the Family Law Reform Act and an indication that that's not an appropriate definition.

So now what are the elements of that agreement? I would assume, as I read this, that it would be possible for two parents who are living apart simply to have a statement in writing with respect to custody and its incidents and access, and that this would be sufficient to raise the suspension. That's my understanding of it. So the ingredients are simply an agreement in writing related to covering custody and the incidents of custody and, presumably, access. If it dealt with those points that would be quite sufficient; it wouldn't have to deal with anything else. Is that your understanding of it, Mr. Preston?

Mr. Preston: Yes, I understood in principle what you are saying, and I think that it's not in the bill.

Mr. Renwick: That's all.

Mr. Preston: If you had incidents of access--

Mr. Renwick: In order to deal with anything, to deal with any of the other items.

Mr. Chairman: Gentlemen, the ministry wishes--

Mr. Renwick: So if we would define it that way: that there's an agreement in writing settling the terms of custody, the incidents of custody and access and that's the end of it.

Mr. Chairman: Mr. Renwick, the parliamentary assistant requests that it be stood down over night.

Mr. Renwick: Fine. I'm quite happy (inaudible) my say as to what it should mean.

Mr. G. W. Taylor: We will have some consideration of it and a definition of "separation agreement" and stand it down, have a look at it. As Mr. Renwick has said, there has been ample opportunity with correspondence and information sent out to many groups, but that doesn't prevent us from hearing further from the groups as they appear before us on clause-by-clause.

I would like to state to Mr. Elston that the matter was

before us before; the group had the opportunity then and they did make submissions. There have been some changes as a result of their submissions. Not all of their submissions have been accepted, nor have all the submissions of the profession; but we have gone quite far towards following those submissions that have been made by different participants, particularly this group.

Mr. Chairman: Section 18 is stood down until tomorrow morning.

Mr. Renwick: I have a couple of questions on section 19. I'm in the hands of the specialist practitioners on it. Do we need, in the various places where it appears throughout the bill, the term "incidents of custody of"? Would it be equally informative simply to say in section 19(a) as the first example of it: "to ensure that applications to the courts in respect of custody of, access to and guardianship for children will be determined on the basis of the best interests of the children"? Does that eliminate the question of adding somewhere else "incidents of access to"?

Mr. Preston: In section 19 that may be sufficient, but in the other parts of the bill there are little bundles of rights, if I can put it that way, that seem to attach to custody or access that can be broken off. For instance, a judge might make an order that custody be to the wife but that the religious training be to the husband. That normally follows the custody, and it's an incident of custody that is dealt with in a separate fashion. So we think it's valid to have a term "incidents of custody," because there are all sorts of little things to do with custody that might be broken off by a court order.

Mr. Renwick: But then if I understood your position this morning we would have to add "incidents of access," too.

Mr. Preston: That's correct.

Mr. Renwick: And similarly, presumably, if the wills and trust people were here, "incidents of guardianship"--

Mr. Elston: The thrust behind the submission on incidents of access is not, in my mind, that way. I think the idea was to give some recognition to the fact that access parents have a legitimate right to participate in the upbringing of their children. As the bill sits now, access is dealt with in a second-class fashion. So my friend may have a different way of approaching it, but I think incidents of access are more important than the incidents of custody, personally. But it is all wrapped up with this idea of there being a bundle of rights. Certain things, perhaps, shouldn't be allotted to the custodial parent.

Mr. Preston: If you are concerned under section 19 about its getting wordy it would have been equally open to say, "to ensure that applications to the courts under this part may be determined on the basis of the best interests of the children," and that means that the whole thing is under the best interests, any application under whatever section.

3:30 p.m.

Mr. Renwick: If we're going to raise the status of "access to" we are going to have to put in the words "incidents of access to" or go to a shorthand method of dealing with it, one or the other, because you're not going to have recognition of a raised status for access unless you get it in here or take it out--anything to keep them on an equal plane. That's all I'm saying.

Mr. Preston: You might be open to saying in this bill that any reference to "custody" shall include "incidents of custody" and any reference to "access" shall include "incidents of access," and then it applies throughout. I don't know, but that is a way you could get at it, I would think, without going whole hog and changing it.

Mr. Renwick: But would that be meaningful in the practitioner's term? If one were to say that would it be meaningful to the judges, meaningful to the specialist bar?

Mr. Preston: Yes, most definitely.

Mr. Chairman: Mr. Renwick, would you like to have an amendment prepared to that effect to section 19(a)? Mr. Spensieri?

Mr. Renwick: I would prepare an amendment to that, or perhaps you would like to prepare it. I rather like the suggestion that has just been made that if we say that "custody of" includes "incidents of custody" and "access to" includes "incidents of access" and, if it's necessary, "guardianship" includes "incidents of guardianship" and have it in the definition area you can delete a lot of those provisions in the bill. That's one way of doing it. It rather appeals to me.

Mr. Chairman: Are you saying, Mr. Renwick, that once you fatten up the definition under 19(a) you will be changing various sections throughout the bill?

Mr. Renwick: Presumably you could delete "incidents of custody" in most places rather than have to add--. Let me stand back; I'm not the draftsman. If the principal submission on this issue that is made by the bar is acceptable to the ministry then you in some way have to raise the status of "access" in relation to "custody" and get it more in balance. As you use "custody" and "incidents of custody" one of the ways of accomplishing that is to use "access" and "incidents of access" so that people will begin to delineate clearly the content of the term "access" in the way that the content of the term "custody" is delineated.

If that's acceptable to the ministry then it seems to me that one of the ways to do it is to accept what Mr. Preston has suggested and include in section 18 a provision that "custody" includes "incidents of custody," that "access" includes "incidents of access" and that "guardianship," if necessary, includes "incidents of guardianship." I leave that to the draftsmen. That's one way of doing it. There's an important point that I think the ministry should address.

Mr. G. W. Taylor: Mr. Renwick, to try to answer your

question, there is the philosophy of the words here, as you have said, purposes in respect of "custody of" and "incidents of custody." There is in the law a group of features that are basic to custody that seem to be definitive in law. We have tried to suggest that there are incidents of those custodies, of that definition of "custody," access as compared to access, and that there has not been a great deal of background on what the incidents of access happen to be.

That's why section 20(5) says: "The entitlement to access to a child includes the right to make reasonable inquiries and to be given information as to the health" et cetera. We are then setting out some of these features that are available to a person who has access to give the court and the litigants some direction as to what access might include without it being spelled out in each and every custody order saying, "Here is custody and what custody is and here is access and what access is."

So that is the reason for the two differences in approach and why it has been mentioned as "incidents of custody" and then it goes on later in the statute to specify some of the incidents of custody that may come about or that the court may look at. That is why there are the two definitions and I guess it is breaking in a new definition of what custody is in words or the incidents of custody are as compared to saying, "Here is the total definition of what custody might be. Here is the total definition of what access might be in incidents." That is the background of the different words in the statute.

Mr. Chairman: It seems pretty fundamental that we get our definitions straight at the very beginning before we continue through clause-by-clause, that we have our definitions nice and tight otherwise we will have a looseness in discussion throughout. Is it possible, therefore--we are in section 19 but we are still in definitions, purposes, et cetera, and there seems to be some question--that we can stand down section 19 until tomorrow morning?

Mr. Renwick: I would like to go through the others as well, because I think it is useful for us to exchange some views on purposes even though we have to stand the section down, simply because again I would like to make certain that when we get to section 42, we will deal with section 19(b) as well on the question of extraprovincial orders and the jurisdiction of extraprovincial tribunals.

Mr. Chairman: If section 19 is stood down, Mr. Renwick, until tomorrow morning, we would stand down the entire section 19, because we have two different problems, if you will, coming under this same section. So may we stand down section 19 until tomorrow morning?

Mr. Chairman: Section 20, custody and access: I hope your immediate answer is it depends what custody is defined as before we deal with section 20.

Mr. Preston: We haven't asked for a definition of "custody" yet.

Mr. Chairman: Are there any comments and questions with regard to section 20?

Mr. Renwick: I never understand most of these bills in any case. I think I understand subsection 1. Subsection 2 talks about "the rights and responsibilities of a parent in respect of the person of the child, including," and then it simply speaks about the "right to care and control of the child." I don't understand. If you are talking about a two-way relationship, if there are rights and what I would have called duties or responsibilities, then it seems to me, if you are going to say "including the right to care and control of the child," you should also put in the concept of the responsibility to care for and to control the child, not just the right.

3:50 p.m.

Similarly with "the right to direct the education and moral and religious training of the child," I think you have to recognize, if you are going to use the word "responsibility" up above, you have to include in this "the right and the responsibility to direct the education and moral and religious training of the child, in the best interests of the child." In other words, from the moving scene about the gradual emergence of rights for children, you can't simply in a bill like this reinforce the right of the parent without reinforcing the correlative responsibility of the parent, as we have tried to put in here, to do that.

It is a little bit offensive to me, in clauses (a) and (b), simply to talk about the right of the parent without talking about the responsibility of the parent in the same clauses, particularly, as I say, when you emphasize that in the early part.

Mr. Spensieri: Mr. Chairman, two points were made by the interveners that struck me as being worthy of consideration. One is that in 20(2)(b) moral and religious are not necessarily synonymous considerations and perhaps ought to be expanded. The other aspect, which was raised in connection with native people, but which I think has wider application, is the question of the right of parents to determine the cultural orientation of their offspring in terms of ethnocultural continuity and ethnocultural grounding. So it seems to me that some expansion is in order with respect to 20(2)(b) to perhaps include cultural upbringing or orientation.

Mr. G. W. Taylor: On the cultural issue, as has been expressed, section 20(2) is defined as general rights. The general rights have then two definitions, (a) and (b), again the general considered attributes that parents have in regard to the upbringing of children--educational, moral, religious, which have been known as the basic rights. I have no liberty to extend it to any other aspects such as, one might say today, culture. You could extend that limit to any number of items that in a more modern society are available to be set out there. But I think that gets back to the comments I made earlier. We have the broad general definitions. We are trying to stay as broad and general as possible so that the court has the aspect and ability to define those rights of care and control, and what they might be, without setting restrictive

limitations as to what they might be. We are looking at them in the general aspect at this time.

If the courts and the people practising the law, who will be advising them, feel, and if it was the Legislature's feeling, that we should set out a total definitive code of conduct, then this document is not it. I would have great difficulty in suggesting what might be a total definitive conduct of care and control of a child for all circumstances, and thus the broad definitions of the right to care and control, which we understand can be in a very broad picture of what the parent has in regard to a child. I do not think I could accept an amendment to include what you have suggested in this section.

Mr. Chairman: Might I ask one question from the chair to maybe legislative counsel and it may be a question of drafting? Is section 20(2) as it now appears any different than it would be if after the word "including" on line three you put the usual "including but without limiting the generality of the foregoing"? Would that change it at all or does this mean the same? Do those two things mean the same? If so, one should not zoom in on and get one's attention on (a) and (b), as they are only examples and no more. Therefore, we are dealing strictly with the first three lines and then "in the best interests of the child." So, Mr. Renwick, does that then not--if you leave (a) and (b) out of your mind for the moment as examples only and read the rest of it--would you not be satisfied that the rights and responsibilities of a parent are given equal weight then?

Mr. Renwick: Say that again, would you?

Mr. Chairman: If you exclude in your mind (a) and (b)--

Mr. Renwick: I have excluded them.

Mr. Chairman: --as examples only, that responsibilities and rights, in the first and second lines of subsection (2), have equal weight, that the parent has equal responsibilities as rights. You are not satisfied that gives the responsibilities also?

Mr. Spensieri: With respect, Mr. Chairman, I do not think these are examples only. I think these highlight certain considerations.

Mr. Renwick: Perhaps I can answer my problem by simply moving that subsection 20(2) be amended by adding at the end of item (a) and (b) the words, "and the responsibility therefor." I am sorry. I am using that business corporation jargon. That subsection (2) of section 20 be amended by adding at the end of items (a) and (b) the words "and the responsibility therefor," so that it would read, "A person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child, including, (a) the right to care and control of the child and the responsibility therefor; (b) the right to direct the education and moral and religious training of the child and the responsibility therefor, in the best interests of the child."

Mr. Davis: If I might interject, you might get the same

result by simply deleting "the right to" out of (a) and (b), and have (a) read, "care and control of the child," and (b), "the direction of the education, moral," et cetera, from that point on.

Mr. Renwick: Sure. There are any number of ways. I am always in the hands of the draftsmen as to what the best way to do it is, as long as the idea is there.

Mr. G. W. Taylor: Mr. Shipley may have some comments on that section as it appeared before and as it combines with the other pieces of legislation.

Mr. Shipley: Yes. Just by way of background, I would point out that these two specific rights are a carryover from the present Minors' Act, which was formerly the Infants' Act, and if we started tampering with those we might raise the question of whether or not we intended something different from what we had before. Under the present Minors' Act, it simply says the father or mother of a minor are equally entitled to custody, control and education of the minor, and (a) and (b) would attempt to reflect that and that only.

Mr. Preston: If you had gone further and added "moral and religious"--and "religious" certainly is a change, because that was a father's right in common law, irrespective of--

Mr. Shipley: Yes. It is true that we did try to deal with section 20 of the Minors' Act, which did try to preserve some authority for the father to direct religious education and equalize that.

Mr. Preston: My concern is if your authority is not to add "cultural"--and I have no big issue, except I found that the native peoples' request was a pretty valid one, and I do not find much distinction between "cultural, moral and religious." But if you say "education and moral and religious," first of all, is it proper English to have the two "ands"? Should it not be "education, moral and religious," or did you intend "moral and religious" to be correlated? Are they separate, or are they part of the same thing?

Mr. Shipley: You may recall from the committee proceedings a year ago last December that this amendment to clause (b) was the result of an amendment proposed partly by you and partly by committee members.

Mr. Preston: But we recommended "education, moral and religious" to make them all three separate items. There was a long debate as to what the "ands" meant and whether "or" should be in here.

Mr. Shipley: Yes.

Mr. Preston: To me, clear English says if you intend education, moral and religious to be three distinct things, it is very simple; you say "education, moral and religious," then they are three distinct things, that is all. If you want to add "cultural," you put another comma in and add "cultural."

Mr. Shipley: Yes.

Mr. Tucker: Just style, that is all.

4 p.m.

Mr. Preston: But when you put two "ands," if you go to rules of structure of sentences, you may be saying that it is "education and moral and religious," and that may lead to an interpretation that moral and religious are one and the same thing, but truly they are not. You can have moral considerations that are not religious and vice versa. I am just trying to prevent that.

Mr. Tucker: Can you suggest a solution?

Mr. Preston: No, I cannot, but I do not think there is any doubt that if you use a comma--

Mr. Tucker: That is why I am saying style.

Mr. Preston: Yes, it is style. But I approach it from what I would argue to the judge if I were arguing.

Mr. Chairman: Mr. Renwick, is that a motion? I did not get whether you said you moved or you suggested. I think you said you moved.

Mr. Renwick: Yes, I moved, but I am quite happy to have that typed and circulated and if anybody else can say it in a better way it is quite fine with me. I am a great believer in shortening it. If the proper way is to say, "including, (a) care and control of the child; (b) the education and the moral and religious training of the child"--if that is what is intended by those words--then that may be an easier way of doing it. If you want to leave it with me overnight, I will be glad to look at it.

Mr. Chairman: Yes. May we stand this down also? On this bill, we seem to be getting caught without our motions clarified. You may even want to do one or two motions of alternative wording on this.

Shall we stand down section 20?

Mr. Renwick: I think, though, that the question of the English of item (b) is very important. "The right to direct the education"--is it supposed to then read, "and the moral and religious training of the child"? Is that what it is supposed to say? In other words, the definite article has got to reappear there because "the education" is a noun, "moral and religious training" are adjectives plus a noun. I think you have to put in either one definite article or two, depending on what you mean by it.

Are you talking about "the education," which is one thing, the second thing is "the moral training" and the third thing is "the religious training"? Some people may say you are talking about only two things, the first of which is "the education," and the second is "the moral and religious training." I do not know what you mean.

Mr. Laughren: "Education, morality and religious training" is really what you want.

Mr. Chairman: Shall we stand this down?

Mr. Renwick: I think it has to be clarified. It is not English at the moment.

Mr. MacQuarrie: With respect to subsection 2, first of all, why is clause (a) in there at all? Is that not implicit in the rights and responsibilities for parents? Would not any court or any sensible person looking at the legislation agree?

The other problem I have is when you have by statute the right to care and control of the child, and you have child defined as a minor, and you have the limbo, 16 to 18, where the child can tell the parent to go jump in the lake, why do you need clause (a)?

Mr. Chairman: I understand from the parliamentary assistant that (a) and (b) did not previously appear and then a previous committee of this Legislature did see fit to placing them in. We have had the advice today that they are examples only.

Mr. G. W. Taylor: They were brought forth in the Minors' Act and this present bill is a type of codification from the different acts of which there have been interpretation upon law. That is where the grouping arrives at with (a) and (b).

Mr. Chairman: Is it possible to combine Mr. MacQuarrie's, Mr. Spensieri's and Mr. Renwick's ideas and someone move to delete (a) and (b) in their entirety? Is that possible?

Mr. MacQuarrie: I have problems understanding exactly what is meant by moral training. With religious training, you have some concept of what is involved there. I also have some problem with cultural training as well. What is involved in cultural training? Is that piano lessons? Or is it something involved with the racial background, the ethnic origin? I don't know exactly what cultural training means at all. They are just two words as far as I am concerned.

Mr. Preston: I don't think that is any different from trying to define "moral."

Mr. MacQuarrie: That is the problem. In education and religious training, you have two areas in which we have a fairly good idea of what is meant. When we get into these very soft and all-embracing words that have a very general application or, in some areas, a very narrow one, it is very hard to know. They are elastic words that sometimes end up meaning nothing.

Mr. Preston: In dealing before the courts with a section like section 20, if you have an (a) and a (b) example, the courts tend to dwell on the items the Legislature has specifically set out on the basis that these are more important than other aspects. They tend to grab what they can see in writing in front of them as being much more important than maybe the other embodied things.

I have no objections to (a) and (b) because right and care and control is the sort of fundamental thing. It also could be that it may be viewed when you use the term "incidents of custody" that these are incidents of custody and then you can break off education as an incident of custody that you might give to an accessory parent.

In other words, you can say, "Mother, you have the child, but father, you decide if he goes to parochial school or not." The tendency might be to view subsection 2(a) and 2(b) as the incidents you are talking about but haven't defined earlier. That is what we were groping with. Maybe it isn't bad to set them out but be specific in what you are doing.

Mr. G. W. Taylor: When you are talking about those three broad headings--"education, moral and religious"--they include pretty well everything. Indeed, they may even include the cultural part you have said. Previously you added another word, but if one wanted to assume an antonym dictionary, we could extend that definition. Certainly, in education, you are going to have cultural education. In the moral, you will have moral education. All of those are there. We are not saying education is definitive in that, "Thou must send thy child to a particular school," or the formal acts of education. It is education in its generic form, all features being under the responsibilities of a parent.

Mr. MacQuarrie: You also have the duties of a school teacher, a wise and judicious parent.

Mr. Davis: One of the reasons the idea of cultural appealed to me was that if you have an interracial or an interreligious marriage, or a case where the access parent, for instance, is interested in the child knowing a particular aspect of his or her heritage, if cultural is in there and if access is expanded a little, you can then use that. That is the specific example of where a wider definition of access could be important. Again, to treat this as a bundle of rights that you can parcel off where it is appropriate--

Mr. MacQuarrie: --divorce with adopted children of about three separate racial extractions, I would hate to see the cultural application.

Mr. Davis: The issue is still there.

Mr. Preston: It doesn't go away.

Mr. Chairman: We are actually getting nowhere with this. Tomorrow, I believe this is being stood down. We need some amendments to that in writing so that we can get on with it. A couple of members of the committee have requested that, if possible, we adjourn a little early because of the traffic and the snow and tight schedules tonight. The chair is going to rule that we adjourn for the day to readjourn tomorrow morning at 10 o'clock.

Mr. MacQuarrie: I would like to readjourn tomorrow at 10.

The committee adjourned at 4:10 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHILDREN'S LAW REFORM AMENDMENT ACT

THURSDAY, JANUARY 14, 1982

Morning sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Treleaven, R. L. (Oxford PC)
Andrewes, P. W. (Lincoln PC)
Breithaupt, J. R. (Kitchener L)
Eaton, R. G. (Middlesex PC)
Elston, M. J. (Huron-Bruce L)
Gordon, J. K. (Sudbury PC)
Laughren, F. (Nickel Belt NDP)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Piché, R. L. (Cochrane North PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M (Yorkview L)

Substitution:

Hennessy, M. (Fort William PC) for Mr. Andrewes

Clerk pro tem: Nokes, F.

From the Ministry of the Attorney General:

Beecroft, D. A., Counsel, Policy Development Division
Shipley, A. Q., Counsel, Policy Development Division
Taylor, G. W., Parliamentary Assistant
Tucker, A. S., Legislative Counsel

Witnesses:

Lackovic, D., Member, Abducted Children's Rights of Canada
Lockie, P. E., Chairman, Committee on Children's Law Reform,
Canadian Bar Association (Ontario Branch), Wills and Trust
Section

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Thursday, January 14, 1982

The committee met at 10:24 a.m. in committee room No. 1

CHILDREN'S LAW REFORM AMENDMENT ACT
(continued)

Resuming consideration of Bill 125, An Act to amend the Children's Law Reform Act.

Mr. Chairman: Gentlemen, there is a quorum in place. We have amendments by Messrs. Spensieri and Elston. You might also note that Mr. Renwick's amendments appear to be stapled out of order. You might look to the numerical order of them as we go along.

Mr. Renwick: I apologize for all my sins of omission and commission.

Mr. Chairman: These are commissions.

Shall we start back at the beginning? We dealt with three sections yesterday, 18, 19 and 20, and they were all stood down. May we go back to 18(1)? Mr. Elston, your amendment suggests an amendment to 18(1)(a) and you are moving the rest down. Maybe we had better take a moment since it is dealing with the definition of "child" and "older child."

Gentlemen, it has been pointed out that Mr. Lockie from the Canadian Bar Association, wills and trust section, was asked to come back and consented to come back this morning because he cannot come back this afternoon. He was asked to come back at this time on the understanding that we would have proceeded further yesterday with the clause by clause, and that we would be considering guardianship, section 48 which is where he has his expertise, this morning.

Am I correct that we cannot at this point, at least not until we have gone a little further with the definition, jump into guardianship?

Mr. Renwick: I have no problem with regard to guardianship except for one thing. I haven't completed the amendments I wanted to make on it, but that shouldn't stop us from going ahead.

Mr. Chairman: Does that mean they are not yet typed?

Mr. Renwick: One of them is being typed. The other one I have not yet done.

Mr. MacQuarrie: By the time we are finished with this bill, it will be a lot of grist for the lawyer's mill.

Mr. Elston: We are saying there is already a lot of grist

for the mill right now. We are trying to clean up some problem areas.

Mr. Chairman: Mr. Renwick, what is the practicality of continuing with section 48 at this point?

Mr. Renwick: With 48?

Mr. Chairman: Yes, with the guardianship section.

Mr. Renwick: I think we should out of courtesy to our witness.

Mr. Chairman: Fine. While we are doing that we must remember that the other witnesses, whose expertise is more on the sections preceding section 48, are also hung up.

Mr. Lockie: Mr. Chairman, if I might interrupt, I cannot be here this afternoon, but I can make time tomorrow, and I can possibly arrange to have one of my associates that was here yesterday come back at some time, if you can give us some guidance, so we do not sit around all day.

Mr. Chairman: That is our problem. We came as close as we could in asking you to be back here this morning. We are afraid we cannot be more exact. In fairness to you, and since you cannot come back, if you could perhaps deal with us now, we will go ahead with the guardianship issue right now. Would you please take a place right here?

Mr. Chairman: We shall stand down all sections up to and including section 47.

On section 48:

Mr. Chairman: Are there any comments with regard to section 48, the appointment of a guardian?

Mr. Renwick: Mr. Chairman, that is one of the amendments I am waiting to receive. I think it is important that after the words "guardian for" in subsections 1 and 2, we add the words "the property of," so that the phrase would read, "a guardian for the property of the child."

To have a statute talking about the guardian for the child in common language is confusing, and I see no problem in making that change here, and then whatever consequential changes there are to pick up that change. Section 48, in total, would then read:

"1. Upon application by a parent of a child, or any other person, a court may appoint a guardian for the property of the child."

"2. A guardian for the property of the child has charge of and is responsible for the care and management of the property of the child."

That seemed to me to be immensely helpful and to clarify what is being proposed. That would, of course, require consequential changes in the other sections to qualify the term "guardian." I am speaking not as a lawyer but as a person used to the English language, that a "guardian for the child" conveys an impression quite distinct from what we are trying to saying in this bill; namely, that the guardian is the guardian for the property of the child. That amendment is coming along in a few minutes.

10:30 a.m.

Mr. Chairman: Mr. Renwick, is it understood that that will carry throughout the bill?

Mr. Renwick: Yes, that is what I meant by saying that there would be consequential changes in the other sections. I did not think it needed my wit to amend each and every one of the sections, but the term "guardian for a child," where it appears in each place in this bill, would have to be changed to "guardian for the property of the child."

I put it forward. I am anxious to have our witnesses contribute to that.

Mr. Spensieri: I am not moving this as an amendment, but it would have been a consequential change of our earlier definitions and of the earlier concepts which would have been introduced by way of amendment, that this section would have conferred the right to an application not only to a parent of a child, but to an older child or any other person. I just make that comment now in case it might have been one of the consequential changes, depending on the success or otherwise of the earlier motions.

Mr. Chairman: Mrs. Lackovic, did you wish to say something?

Mrs. Lackovic: No.

Mr. Chairman: Can we stand down section 48? Can we intelligently deal with section 49 and subsequent sections unless we have section 48 passed, or otherwise, as per Mr. Renwick's amendment?

Interjection: Did he formally move the amendment?

Mr. Chairman: No, we are waiting for that to come in. My point is, can we stand that down and carry on?

Mr. Elston: Can we have the reaction of Mr. Lockie to Mr. Renwick's suggestion? The suggestion has been raised and we can discuss it, at least.

Mr. Lockie: Mr. Chairman, my view is that it is a perfectly logical amendment, but makes it somewhat cumbersome. It would seem to be easier to make "guardian" a defined term, and then just use the word "guardian" from then on. Mr. Renwick's problem with that is that when you have a statute which simply uses the

word "guardian," if you are using it in the defined sense, which is different to what the general public is used to, maybe that continues to be a problem. It would make it more cumbersome legislation if you had to have "guardian of property" every time you intended to use that word. Whereas, if you simply define it, it is easier to deal with.

I do not know whether that solves Mr. Renwick's problem. You are still going to have the word "guardian" only you are going to have a slightly different meaning.

Mr. Renwick: I always take the position that I do not mind how the problem is solved. If that is a better way of solving it, that is fine. It might be well to have the definition right in this particular portion of the bill, where the term is used. I do not care, but I think it is absolutely essential that we not mislead people by the use of the term.

Mr. Lockie: I agree with your concept entirely. It would simply be easier to define the term.

Mr. Renwick: I will put my amendments. They can always be passed or dealt with on the basis that if there is a better drafting way to achieve the object, I am always agreeable to that.

Mr. G. W. Taylor: In reply to that statement, Mr. Renwick, and the amendment which might be forthcoming when you move it, considering the words that you have put forward as your possible amendment, Mr. Shipley will speak to it in greater depth. However, section 48(1) has used the term "guardian for the child." Subsection 2 is the relative definition of what the guardian is for the purposes of this act. We are not trying to define "guardian" in all its possibilities as may be known in common parlance compared to the legal interpretation that we might desire for it in this particular bill.

The term "guardian for a child" where it appears in this particular bill--I guess an analogy would be the phrase "common-law wife," but there are many courts and judges who would jump on you had you dared to use such terminology, although it seemed to be common with the legal profession and certainly common to the public at large.

This is another one of those difficulties we are going to have in trying to secure a definitive approach by way of defining guardian when we are only trying to do it in regard to this particular legislation.

I leave that with you and I bow to Mr. Shipley, who can explain more fully the reasoning for the drafting of this particular section.

Mr. Shipley: Thank you. I understand the concerns that have been expressed. I think it was our intent, from a drafting point of view, to avoid having to say "guardian for the property" throughout the remainder of the sections. That is why we said "guardian" in subsection 1 and then in subsection 2 said what a guardian is.

Again, as a result of these amendments in this bill, there will be no other statutory provisions in Ontario for appointment of guardians, so the term will eventually disappear from our legislation, except to the extent that this will be the only power for the court under legislation to appoint a guardian. Therefore, the description of guardian in subsection 2 makes it clear what is intended.

Another problem is that if we use "guardian for the property" throughout, it still may create the impression that there is some power somewhere to appoint a guardian for the person. We tried to avoid that confusion.

Mr. MacQuarrie: Could it possibly be simplified and answer all questions that have been raised by simply saying "guardian for a child appointed under subsection 1 has charge of"?

Mr. Shipley: I do not think that takes us much further. That is certainly what is intended by subsection 2. Subsection 1 says that the court has the power to appoint a guardian, and subsection 2 is exhaustive of what a guardian means when one has been appointed by the court.

Mr. MacQuarrie: Is it exhaustive?

Mr. Lockie: Mr. Chairman, I agree with Mr. Shipley. I just wonder if subsection 2 could be expressed to be more exhaustive than it presently is if it said, "in this part guardian means," and I do not know exactly what words you would use, but almost the words that are here. It would highlight it a little bit that that is what it means and that subsection 2 is not just one part of what a guardian is but it is a complete definition of what the word means. It would just strengthen it a little bit.

Mr. Chairman: On the assumption that the word "guardian" appears--and I do not want to go through the various spots where it does--in other parts of the act, am I over simplifying it to ask is there any reason why the term "guardian" cannot be defined at the very beginning of the act in section 18? Does it change its meaning throughout the act?

Mr. Renwick: It does not change its meaning throughout the act, as far as I understand it. I would try to express it this way: If you define the term "guardian," I basically do not care where it is put. I am always interested in a person being able to read the statute and understand it without having to be a lawyer to do so. I think that we must define the term, and I am quite prepared to do it that way, or the way in which I suggested, which I am quite happy to withdraw if we do define it.

10:40 a.m.

Unless we define it, we will be misleading the people who will be dealing with the statute and misleading the person who receives an appointment from the court if he is called guardian for the child in that appointment. If, on the other hand, we define the term, presumably the order appointing it will be bound to use the term "guardian" in its defined sense, or to use it simply as

guardian with that meaning. I think it is an essential amendment for clarification. I do not think it touches the substance of the bill in any way, shape or form.

Mr. Elston: I wonder if we could read section 48(2) this way, by adding the words, "A guardian for a child means a person who has charge." I think that would be a little more exhaustive of the scope of his duties. I think the agreement is there on what we are trying to do. I do not know whether we are all agreeable as to how it is being done.

Mr. Chairman: Mr. Elston, my comments were not addressed to what is in the definition, simply the placing of it. As it is now, if you define it in section 48 and it says "in this part," and the term is used anywhere else in the act, then you have left that term in limbo without a definition and the implication is somehow different. I am only talking about where it comes and I am not dealing with the merits of the wording or the defining.

Mr. Elston: If there is an agreement that there be a definition of it and that it be used throughout, I think the proper place, as submitted before, would be in the interpretation section, but I think we have to have an agreement in principle that the definition has to be made available for the whole of the act.

Mr. Chairman: Gentlemen, can I ask one question while the legislative counsel is discussing this with the ministry people? I have just received three amendments of Mr. Renwick's dealing with sections 43, 48 and 52. Have I now received the last of the amendments we are going to receive? Are there more?

Mr. Renwick: Including the two which I submitted yesterday, I believe that is all unless, of course, I run across a serious error in the bill.

Mr. Chairman: But that is your intention so far as putting them in is concerned?

Mr. Renwick: Yes, subject to the one which we are going to come to in a minute or two which defies my ability to draft. I am going to ask our scholarly practitioners who are here to draft what should be done in consultation with the minister's advisers. Apart from that, you have got all of mine.

Mr. Chairman: Thank you. Do we have all the Liberal amendments now that are contemplated at this point? Thank you.

Mr. Spensieri: Save and except, Mr. Chairman, if the previous amendments carried, then there will be consequential changes to this section almost automatically.

Mr. Chairman: We have in front of us the motion of Mr. Renwick regarding section 48. You have that written amendment in your hands. That is one of the last three amendments that were delivered to you.

Mr. Renwick: I gave the clerk a copy of it.

Clerk of the Committee: They are just being copied. The Liberals have it but none of the PCs at this table.

Mr. Renwick: I am quite happy to withdraw my suggested way of accomplishing the objective of section 48 if there is agreement that the term will be defined. As to the location of the definition, I am quite happy if it goes in the definition section 18.

Mr. Chairman: How do you respond to this?

Mr. G. W. Taylor: As Mr. Shipley has explained, and I have had discussion with the legislative counsel and the ministry legal persons here, based on the fact there will be no other definition of guardian in any other section or any other legislation, the decision was made to prepare section 48(1) and (2). Section 48(2) is the definitive feature of guardian. It will not be anywhere else in law, and it was felt that was the best way to put it forward. I have to bow to their drafting knowledge and philosophy in features that have gone into preparing these two definitions.

When it was being prepared, there was some discussion on putting sections 1 and 2 together, but in legislative terms that was discussing two thoughts in one section, which was not to be desired for legislative purposes. It was felt that the feature of subsections 1 and 2 the way it is now is the one that the ministry must stand by as the best one to serve the purposes of the legislation.

Mr. Chairman: Thank you. Shall we deal with Mr. Renwick's motion, the second last one, on its own merits and standing in the place where he moved it? Are there any other comments with regard to Mr. Renwick's amendment to section 48? Mr. Renwick, do you want to read it into the record?

Mr. Renwick: I am actually speechless at the explanation given by the ministry. It bodes very poorly for us getting this bill completed during the course of the day if an obvious change such as that is going to be met with that kind of response.

The response of the parliamentary assistant would indicate that subsection 2 is the exclusive definition of the term "guardian for the child," but they refuse to say so. There is nothing in the language of this statute which says that is the exclusive definition of it. The English term "guardian for the child" would not convey to anybody other than a lawyer knowledgeable about this statute that the guardian for the child was the person who had the responsibility for the property of the child and did not have any responsibilities with respect to the person of the child.

Let us not be unnecessarily rigid. I don't want to be unnecessarily rigid in favour of accuracy, but I do want to be unnecessarily rigid in relation to inaccuracy and what it will convey to people other than lawyers. I am simply saying that if a court appoints a person as guardian for the child, it will be totally misunderstood by the great majority of the people who will be the persons who are guardians unless they happen to have legal training.

I would not want to use about the parliamentary assistant, his minister, or his advisers, the term "stiff-necked," and I wouldn't, of course, use that term.

10:50 a.m.

Mr. MacQuarrie: In trying to include the definition of guardian in the section here, we may be sort of overshooting. First of all, the order appointing the guardian would certainly, to my mind, outline the responsibilities and duties of the guardian, particularly when in deciding the application the judge involved is going to be looking at a scheme or proposal for administration of property. So I think the order would clearly specify what the full extent of the duties and obligations of the guardian were. To an extent, it would seem we are arguing over something that would sort itself out in any event.

Mr. Spensieri: Mr. Chairman, if we could remove ourselves for one moment into the real world of an office and a litigant comes in and asks you to obtain an order for guardianship of a child, I think in common parlance and in the mind of that individual they would be expecting an order for both the custody of the person and the ancillary right to have some control over the property of the child.

If we are going to reverse that by legislative language, I think we owe a duty to be absolutely certain that we spell out what we mean by guardian of the child. If guardian of the child means guardian of the property of the child, then we had better damned well say so in very clear and precise language. This should be our main concern here and that is why we would be supporting Mr. Renwick's amendment.

Mr. Mitchell: Do you mean it should say "guardian of the child and the property of the child"?

Mr. Spensieri: The definition excludes any control over the person. It relegates it exclusively to control over property and we have got to say so, because the average litigant would expect it to say the exact opposite, that it would include the person and the property.

Mr. Laughren: What tends to be overlooked sometimes is the number of lay people who actually read legislation. I am always surprised in my constituency office by the number of people who ask me for copies of statutes. You may think that is a minor point--it is not a large number--but it is a fact that lay people read legislation. As a lay person as far as the law is concerned, there is no question about what I have always thought guardian law is until about this week. If you talk to anybody out there, the nonlegal members of this committee, I will bet they would admit that "guardian" to them meant custody of the child. I never had any doubt in my mind about that.

I don't think Mr. Renwick's amendment alters anything that should bother the ministry. I don't know why there is even any concern about it. The laws are for the people out there, not for practising layers, and I think it is only fair.

Mr. Renwick: Mr. Chairman, I move the words "the property of" be inserted after the word "guardian" in section 48(1) and (2). I make this not part of the amendment but I further state that if the motion is passed there would be consequential changes in other sections of the bill for the purpose of conforming to that change.

Mr. Eaton: I just want a little clarification from the parliamentary assistant on the real intent. Is the intent that it just be guardianship of the property of the child for this bill?

Mr. G. W. Taylor: Yes, Mr. Eaton. This piece of legislation takes the definition and use of guardian out of any other existing legislation. In the Education Act we have a guardian appointed. It is going to be removed from that.

Mr. Eaton: It is going to be removed from that?

Mr. G. W. Taylor: From that as a definition, so this will now be the exclusive definition of guardian.

Mr. Eaton: If somebody wants to become what we understand as guardian now, what do you apply for or what do you do?

Mr. G. W. Taylor: You would then have to apply for custody as compared to guardian. Guardian will now only be that of the property, and that is why section 48(2) is in there, it refers to and is really the definition of guardian and the purpose of guardian.

Mr. Chairman: What would you be known as if you had custody of the child? The custodian?

Mr. Eaton: Custodian, yes.

Mr. Chairman: You are now the custodian.

Mr. Eaton: I always thought that was the janitor at the school. How these lawyers can screw up the English language is beyond me.

Mr. Lockie: I think a lot of people who have read the bill are already talking about a custodian, although it is not a defined term anywhere in the bill, and I think probably it was considered not a desirable term because of the other uses to which it is put in the present-day language. It would be logical, though, to have a term "custodian" and a term "guardian" and have two separate meanings for them, and then you would eliminate the confusion. Perhaps custodian is not the best word, but--

Mr. Eaton: It would make a lot more sense to have "guardian of the child" and "custodian of the property."

Mr. Renwick: That is right.

Mr. Eaton: It is certainly practical. These lawyers keep mixing us up.

Mr. Spensieri: To make matters worse, when they ask you to appoint a testamentary guardian, you are only giving away the property when they ask for a will.

Mr. Chairman: That is correct. The testamentary guardian has nothing to do with the child, only the bricks and mortar and stocks and bonds.

Mr. Spensieri: Which is totally different from what people expect.

Mr. Mitchell: I am following along with Mr. Laughren's point. Not being of the law fraternity, just the way I always assumed guardian to be, I am concerned with Mr. Renwick's motion because it does not seem to answer the very point that I think Floyd and I raise.

I have always taken it that the guardian was responsible for the child, for the wellbeing of the child and any property or whatever that the child might be inheriting. That is as a layman. That is the way I understood it, and I just find that the comments the parliamentary assistant has made and the comments that have come from the other side now leave me totally confused. We are now saying that "guardian" is defined here and it is defined there.

Mr. Eaton: You mentioned that you were going to take it out of all these other acts. What does it mean in all those other acts now? A guardian is a guardian of the child under the Education Act, not of the property. Why do you want to change it all? Tell me. Explain it to me a little better. I think you had better take that one back for some reconsideration or something.

Mr. G. W. Taylor: Mr. Shipley will explain. There are some features of it that have come from the law reform commission and the previous--

Mr. Eaton: That is another strike against it.

Mr. G. W. Taylor: --studies as to why it has arrived at this particular status. Mr. Shipley can explain some of the law reform commission's reasoning to reduce "guardian" to its existing use. It may better serve the members of the committee.

Mr. Shipley: Excuse me for just a moment. Since there is not going to be much weight given to the law reform commission reports, I do not have much to say; but it is interesting that just this morning I got on my desk at the office a report from the law reform commission of Saskatchewan dealing with custody, guardianship and other matters relating to children. They brought the same matters forward, saying that there has been growing confusion about the relationship of the person who has custody of a child and a person who is guardian of the person.

11 a.m.

It seems that people who have custody, and the courts seem to assume that when they make an award of custody they do mean all the

rights and obligations that were historically associated with guardianship of the person, so "guardianship of the person" has come to mean custody; therefore, in section 20 I believe it is, our earlier section, that is why we say custody means all the rights and responsibilities with respect to the person of the child. We have tried to divide that up. Our own law reform commission pointed that out and, as I said, that has been picked up by the Saskatchewan Law Reform Commission and a number of others. The distinction has also been made in the English legislation, the Children Act, 1975.

There has been a lot of confusion about guardianship of the person and custody, so we have tried to end that confusion anyway and get rid of this extra concept of guardianship of the person, call it all custody, and reserve the term "guardian" for guardianship of the property.

It may take some time for re-education, but eventually we will realize that when the court makes a custody order it is with respect to all the personal rights, and when the court makes a guardianship order we are talking about the property. As I said, it may take some time for that to filter down. Some of our family law reforms took some time to filter down, but eventually people will adjust to that and in the long run it will help to clarify what the rights are and what the terms do mean.

Mr. Eaton: The fact that Saskatchewan is doing it, how do you allow for that? What is your answer to Saskatchewan?

Mr. Renwick: They just point out the same problem. I have not seen what act the Saskatchewan government has. I assume the Saskatchewan government, in order to carry through the logic of the change which is being made, would define the term "guardian" so that people would have the incentive to understand that it now does not mean what it used to mean, it now means something else; but this bill does not contain any definition of it. I think the law reform report from Alberta would probably make the same point, and you and I would be in total agreement again.

Mr. MacQuarrie: In terms of uniformity, what does it indicate in other statutes?

Mr. Shipley: I am sorry. Other statutes?

Mr. MacQuarrie: Other jurisdictions.

Mr. Shipley: In other jurisdictions. As I said, this follows some of the English legislation. The other jurisdictions in Canada have not had major reforms of their child custody law, with the exception of British Columbia, and I do not quite recall what they did. They may still retain the old terms or have guardianship of person and guardianship of property. The Saskatchewan reforms are just recommendations of their law reform commission; they have not been enacted yet.

Mr. MacQuarrie: But you made mention at the outset that there was a hope of bringing a lot of this legislation into uniformity. Has any discussion been held in terms of the other

provinces with those involved in the preparation or recommendation of uniform statutes in respect of this particular section?

Mr. Shipley: The efforts with respect to uniformity have been directed towards uniformity on the provisions for enforcement of custody orders and prevention of kidnapping. It has not been before the uniform law conference to deal with a uniform custody statute dealing with awarding custody in private custody disputes.

It seems to me that when the court makes an award of custody under the Divorce Act it means all the rights that we previously associated with guardianship of the person. They do not use that term. They do not award guardianship of the person in a divorce case; they award custody, and they mean everything that in the old language used to mean guardianship of the person.

I did not bring all the law reform commission reports because my briefcase is not that big. I did have some excerpts from the federal law reform commission's background paper, Studies on Divorce, that talks about the confusion and the changing meanings of guardianship and custody. It would be helpful to read that. I will not clutter the record otherwise.

Mr. Mitchell: Mr. Chairman, I am sitting here, to use Mr. Laughren's term, as a layman. I am listening to all of the--

Mr. Chairman: Mr. Mitchell, on this question you need not refer to yourself as a layman. The solicitors in the room are having as much difficulty as you are.

Mr. Mitchell: That is the point I was going to come to. In fact, you read my mind. I am sitting here and I am somewhat amazed at what appears to be several different opinions within a group of lawyers. I find it very confusing.

Interjections.

Mr. Chairman: Like court cases.

Mr. Mitchell: That is precisely my point. What I am coming down to, Mr. Chairman, is I think in fact, the statement, the one that I have greater appreciation for, was made by Mr. MacQuarrie earlier. That is, I guess, when it comes down to the end result is the court is the place where the decisions are made as to what are going to be the responsibilities of a certain person, whether they are going to be a custodian or a guardian, the court in the end result makes those decisions.

I suppose I can appreciate the legal people wanting to be able to say to their client, "This is precisely what it means," without having to go to a variety of different acts or statutes or whatever. But, the court in the long run is the one that makes the decision and has to do the interpretation.

Just from the discussion going on here, I seem to be coming to the feeling that what is being done here is really the only way we can do it. I could be wrong. But you in fact must have been reading my mind, Mr. Chairman.

Mr. Chairman: Mr. Mitchell, the idea of statute--the Legislature sets the policy and sets the statute. The courts only interpret that statute and then you find if the courts interpret the statute other than the way the Legislature wishes, then immediately the Legislature changes the act, as we recently did under the Personal Property Security Act and Corporation Securities Registration Amendment Act. The court interpreted it in such and such a way and Mr. Walker came out with a new bill to clarify it. So therefore, the legislation is where it starts. You do not throw it over to the courts deliberately.

Mr. Mitchell: All right. If that is the case, Mr. Chairman, I suggest that what we are talking about here has to go even miles further than what is being proposed by Mr. Renwick.

My question is, based on your very comments, how far do we go in this? Do we have to then start putting in definitions of custodian, if that is the word to be used, and all of these other things?

Mr. Chairman: We must in theory try for perfection in definition so there is no ambiguity for the courts to decide upon.

Mr. Mitchell: Right. But the answer we are being given is that the definitions of custodian and so on are given here and there and somewhere else.

Mr. Renwick: Mr. Chairman, on a point of order. The word "custodian" does not appear in the bill, so there is not a question of defining it. The word "guardian" does.

Mr. Chairman: Mr. Renwick, you do understand Mr. Mitchell's point that he who has custody will soon get to be known as a custodian?

Mr. Renwick: I doubt it very much. I would hope not. I do not think custodian will ever become a term. I do not think you can do that kind of wrenching of the English language. I really do not think you can.

I do not think even the lawyers can make people think the custodian is the person who has charge of the person. Ordinary English language never grew up that way. Custodian does not mean a person entitled to the custody of the child. I would have been very concerned if the bill had gone to the point of defining a term called custodian and trying to introduce that term. That is exactly the opposite of what I am talking about.

I am talking about a term which in the English language and ordinary parlance has one meaning and we are giving it another limited meaning and I want that act to be clear, whether we are entitled to do it or not. I think we have to be clear.

11:10 a.m.

I understand Mr. MacQuarrie's point and I hope to God a judge will understand that and impress it on the person who receives the

appointment, or the wording of the order will so provide, but I do not have any control over that, nor does this assembly. But we do have control over the fact that the term "guardian" is now going to have a specific meaning, significantly different to what ordinary people think it means. I think we have to say so in unmistakably clear terms.

11:10 a.m.

Mr. Elston: I am pleased by a couple of things. One is the recognition of the fact by Mr. Mitchell and others that it is our duty, if we are going to be precise, to expand the definition section so we can actually have an area where we can go to and have the practitioners looking at those things to see what they are dealing with in terms of the concepts of the bill, and that would include several other things that we spoke about yesterday with members of the Canadian Bar Association's family law group and others.

I think when we make changes like this we have to flag them so that people are well aware that we were very clear in our intention of creating a new concept. People ought to know it and it ought to be out where people can see it without having to bury themselves into section 48 or wherever that might be.

I want to say as well, in answer to a couple of the questions about throwing any of our imprecision into the courts for the decision of judges who preside, that what we were really doing by our lack of initiative and our sort of laziness, if it can be put to that, was throwing it on the shoulders of the individual citizen to spend a lot of money to find out what we should have been discussing here in committee. I think we owe it to the people who are paying us to be here on this committee to be as precise as possible. If we are going to set out a section that is to interpret what this bill is to mean, we ought then to do it with some precision so that any person who becomes a litigant would not have to spend money to decide.

I recognize from being in courts that the judges do not like to interpret what we as legislators had in our minds. I do not want to have to go to Hansard, and gosh only knows reading some Hansards of committees is not the most exciting thing you can do. I think we ought to be precise. I think the parliamentary assistant and the Attorney General's staff ought to reconsider expanding the interpretative section to include a number of the very basic definitions which have been set out. One of those basic definitions in terms of this bill has to be the definition of guardian.

I do not think we ought to be lazy and decide it is up to a couple of lawyers who represent people and a judge who sits in a court room to decide what we really meant, if we have a clear intention. If we do not have a clear intention, let us drop this section of the bill altogether because we are only confusing something that has a common-law basis now. That is my concern.

Mr. MacQuarrie: Then we have to scrap custody as well.

Mr. Davis: I think Mr. Renwick's point is put more eloquently. I would certainly agree with Mr. Renwick in the way he has put the point. What the Legislature is doing is creating a term of art in the sense that I use that word. It does not mean what it used to mean. Definition seems to be a very simple way of doing it. The drafter of the act says that subsection 2 was intended to define it, so let's define it.

Mr. MacQuarrie: But the draftsmen say it is defined.

Mr. Lockie: Mr. Chairman, I agree. I think we have got hung up here on a very small point. I think it is agreed by everybody that we are creating a new term which does have a new meaning. When we are doing that we should be clear as to what it means. What we are being told is that section 48(2) makes that clear. I think the sense of the members in this room is with a few changes to the wording of that section it would be clear enough to make everybody happy, but right now it is not quite as exclusive and as clear a definition as it should be.

I do not know why that could not be with very little difficulty turned into a clear and exclusive definition. I think Mr. Shipley agrees it is intended to be that. Simply in my view, it is not quite there.

Mr. Chairman: Rather than having 16 conversations going on, the chair is going to take an adjournment for five minutes to fill up, to empty up, or whatever you wish, while the technicians try to get this definition straightened out.

The committee recessed from 11:18 a.m. to 11:33 a.m.

On resumption:

Mr. Chairman: Mr. Taylor, do you have anything to report to the committee?

Mr. G. W. Taylor: After lengthy discussions with the legislative counsel and advisers to the ministry and other members of the committee, for fear of getting a supple neck--not that anyone would or has said the ministry has a stiff neck--I think Mr. Renwick's motion, as presented, to insert the words "the property of" in section 48(1) and (2) could be an amendment the ministry could accept as a change and amendment to those particular subsections.

It would possibly necessitate--and we leave that up to the legal draftsmen--that where "guardian" appears elsewhere in the act, those qualifying words may also have to be inserted.

Mr. Chairman: Do you want to add some additional words in the motion? Is it suggested, Mr. Renwick and Mr. Taylor, expanding the motion to say, "and all other necessary places"?

Mr. Renwick: I am in Mr. Taylor's hands, but I think those are things that would be picked up.

Mr. G. W. Taylor: I understand from legislative counsel, Mr. Renwick, those are picked up .

Mr. Mitchell: You said the motion is as it is written. I don't think that is what Mr. Taylor said.

Mr. G. W. Taylor: No, it is not as written. I think legislative counsel also prefers "property of" to be "of the property."

Mr. Renwick: I am quite happy with that.

Mr. Eaton: So we are inserting after "guardian" the words "of the property"?

Mr. Tucker: "The guardian of the property of."

Mr. Eaton: Of the child.?

Mr. Tucker: "Of the property of the child."

Mr. Chairman: Is it satisfactory, Mr. Renwick, to add that other word "of" to your motion?

Mr. Eaton: That is confusing me a bit further because you have got an appointment of a guardian of the property and you are doing it for the child. He is a guardian on behalf of the child, so why are you sticking another "of" in there?

Mr. G. W. Taylor: Is it not "guardian of the property for the child"?

Interjections.

Mr. Chairman: Mr. Renwick's motion will now read that the words "of the property of" be inserted after the word "guardian" in section 48(1) and (2) and that the word "for" be deleted in each of the subsections.

Mr. Renwick: I absorb that amendment and I so move it.

Mr. Chairman: Thank you, Mr. Renwick. So that there is no confusion, the word "for" which we refer to is the first usage of the word "for" in subsection 2 because it is not the only one that appears in the subsection. Are there any other comments with regard to Mr. Renwick's amendment?

Motion agreed to.

Section 48, as amended, agreed to.

On section 49:

Mr. Elston: The consequential changes will be made as they carry on through.

Mr. Renwick: I think we should agree with that. Those are technical, consequential changes.

Mr. Chairman: That is the consensus of the committee, I note. Those will be made by legislative counsel automatically.

Section 49 agreed to.

On section 50:

Mr. Chairman: Are there any comments? I believe the Canadian Bar Association has some comments with regard to 50(b).

Mr. Mitchell: I have just one comment, Mr. Chairman. In the amendment that was just proposed and accepted, we have gone along with the same wording under 50(b), "of the property of the child."

Mr. MacQuarrie: Mr. Chairman, I just wonder, with respect to this section, whether there should be a definite onus placed on the guardian to put forward a plan of administration rather than--

Mind you, I am not dissatisfied with the section as it stands. I just wondered whether there should be--

Mr. G. W. Taylor: Is that not in there, Mr. MacQuarrie? Section 50, the merits of any plans.

11:40 a.m.

Mr. MacQuarrie: It says "consider the merits of any plans proposed by the applicant." There is no onus on the applicant to even submit any proposal, just to say, "I am well capable of looking after the child's property." I raise that incidentally, Mr. Chairman. I am not hung up on it.

Mr. Renwick: I think it is quite a valid point, but in my reasoning--and it may well be that others would want to speak in more formal terms about it--if the property merited some plan, it leaves it open to the court to deny the appointment until such time as a plan is put forward.

I would assume that if the property was of any significant or substantial amount or value the court probably would require that as a condition of making the decision to appoint. I am content with that section.

Section 50 agreed to.

Section 51 agreed to.

On section 52:

Mr. Lockie: Mr. Chairman, I do not know if you want my comments at this point, but the comment we made yesterday, and that we feel is still a defect in the bill as it is presently drafted, would require the insertion of a number of new sections between 50 and 51, which would state that the court when appointing a guardian would propound a scheme of management and would confer powers to implement that scheme of management upon the guardian.

In the time that I had available to me I have not felt competent to draft those sections or proposals, but my view would be that if this committee were to look at the Mental Incompetency Act, there are a number of sections there which could almost be adopted exactly, simply changing the words "mentally incompetent person" to "infant," and you would have a scheme and almost a complete code for managing an infant's property. That would be our submission.

Mr. Chairman: That is following along the philosophy and comments of Mr. MacQuarrie. Are there any other comments?

Mr. Renwick: I support the proposal. I had an opportunity to discuss the matter with our colleague who is a witness before us this morning. Since there is no amendment before us and no amendment has been specifically proposed, I would like to get some assurance from the ministry, not necessarily for this bill when it goes through its process, but that it give serious consideration to that representation with a view to introducing amendments in this Parliament to elaborate upon that proposal by the bar association, if the ministry feels it merits consideration.

Mr. G. W. Taylor: I would bring that to the attention of the minister prior to coming on for third reading or when it gets back to the House.

It is considered that section 50 and some of the features in there under (a) where the ability to manage, first, is looked at, and if any plans are proposed the merits of them, and naturally they can propose any to the court. I am sure there is not any code in any other piece of legislation that says, "This is the way a scheme should be propounded," even under the legislation Mr. Lockie works under, the Trustee Act, et cetera. You can go back to the court and give full information to the court in general terms, but there is no legislation that says this must be what one looks towards in preparing an order.

I think when you look under the ability and plans it gives that judge the freedom to look at many features to suit the needs of the child. That does not prevent us from looking at some proposed amendments, but I think the generality of the way the section is at present allows for contemplation of many types of proposals and schemes.

Mr. Renwick: The only other comment is that I would urge the representatives from the bar, if they feel strongly about this, to write to the parliamentary assistant enlarging upon their comments and, if possible, perhaps suggesting a proposed amendment to it, so that it will get into the mill for consideration in due course.

Mr. Davis: One short observation. The section uses the phrase "lawful custody" in subsection (c). If my recollection is correct, that is the only place in the bill where that is used.

Mr. G. W. Taylor: We are just getting to that.

Mr. Chairman: No, actually we are on 52. I did call for 52, so, Mr. Davis, you are quite in order, and I believe Mrs. Lackovic had some comments in her presentation on this section as well. Carry on, Mr. Davis.

Mr. Davis: Just the one point on 52(1)(c), I believe that is the only time the phrase "lawful custody" appears in the bill. I am wondering whether there is any possibility of confusion in view of the fact that a person could have custody under an order or a separation agreement, or with the express or implied consent of the other person, or the other parent may have made no arrangement as far as custody goes. Is there something special about "lawful custody," and should it perhaps not read simply "custody"? It is a drafting question; it is not one on which I have an express opinion.

Mr. MacQuarrie: It comes to just simple de facto custody.

Mr. Tucker: Just glancing through the bill, I see section 36 also refers to lawful custody.

Mr. Davis: I stand corrected.

Mr. Tucker: It may appear in other places, as well.

Mr. Chairman: Mr. Taylor, is there a distinction to be made between "lawful custody" and "custody"? Do they differ?

Mr. G. W. Taylor: I am advised that the use of the word "lawful" was a qualified intended use in that one could have, if you want to put together, custody which was not lawful. The lawful part of it was considered, as Mr. Davis has mentioned, features of custody that are brought about by a separation agreement, court orders, consent of the parties, so that it was an intended use of the word, "lawful," to qualify "custody." So there was an intended use of that word in the section.

Does that assist you, Mr. Davis? It was put in there intentionally.

Mr. Davis: The assumption I am making is that that is intended to exclude a person who has de facto custody and no other qualifier, under section 20 for instance. If the person happens to have custody then that would be excluded, but all the other forms seem to be included.

Mr. Tucker: I do not know whether you are saying that de facto custody is unlawful custody or is not lawful custody.

Mr. Davis: That without anything else, without the express or implied consent of the other. I am just trying to see what we are excluding in the definition.

Mr. Tucker: You are making the distinction between lawful and unlawful. It may be in another section of the bill there is a reference for instance to unlawfully withholding custody, unlawfully withholding a child from a person who has the right to custody. De facto custody may not be unlawful, but that is not the

issue. It is simply a question of lawful as against unlawful custody.

Mr. MacQuarrie: What do we mean by unlawful custody?

Mr. Tucker: It may be custody contrary to an order of the court.

Mr. Chairman: Am I correct then, we have at least three types of custody, lawful, unlawful and custody that is neither?

Mr. Tucker: No, I think you just have lawful and unlawful custody. There might be various subdivisions. It might be lawful custody if it is custody in accordance with an order of a court. It may be lawful custody where the persons who have the right to custody all consent to it. The consent make take the form of a simple agreement. It may be a separation agreement, a domestic contract of some sort.

Mr. Spensieri: Mr. MacQuarrie's terms are more correct. De facto custody may be either lawful or unlawful.

Mr. Tucker: That is correct.

Mr. Spensieri: Then that is all you really have.

Mr. MacQuarrie: You try to fit the circumstances and you think of a child of deceased parents living with an aunt or uncle, just as a member of the family, without any formal order or anything else and a whole pile of other aunts and uncles presumably would be equally entitled to custody.

Mr. Spensieri: That would be de facto lawful.

Mr. MacQuarrie: I would be inclined to suggest it would be unlawful.

Mr. Tucker: That is right. There would be implied consent of the other people, so it--

Mr. MacQuarrie: It would be an implied consent, I would suppose.

Mr. Chairman: Thank you. Are there any other comments with regard to section 52?

Mr. Lockie: Mr. Chairman, one small drafting point. Our suggestion yesterday was it is not totally clear whether the \$2,000 limitation which is in section 52(1) refers both to personal property and to money. I think that could easily be corrected simply by inserting the words, "in a year," or, "in any year," in another place in the section.

For example, in the third line I think it would be clearer if it read: "The payment in any year of not more than \$2,000, or the delivery in any year of the personal property to a value of not more than \$2,000," to A, B, and C. It is simply a small drafting

point which we do not feel particularly strongly on but think it would add clarity.

Mr. MacQuarrie: This particular section, Mr. Chairman--here again, raising a hypothetical situation which I suppose could quite readily occur. We have the trustee established by will. People having custody of the child, the trustee being directed by will to pay the net income of the capital assets for the care, maintenance and education of the child, the receipt of the lawful guardian and all the rest of it being proper, he is under a duty to pay that money to the child. We are sort of seemingly limiting it to \$2,000 and a maximum of \$5,000. Are we hamstringing in any way the powers of a trustee under a will?

Mr. Shipley: If I could speak to that. We are certainly not intending to hamstring trustees at all. This would be of benefit to the trustee where the trust did not establish anyone who could give a valid discharge for payment of--

Mr. MacQuarrie: Ordinarily a will includes a clause, of course, (inaudible).

Mr. Shipley: But in a case where the will did not--it might not arise under a will. Sometimes insurance proceeds are payable to the child and they fail to appoint a beneficiary who can give a valid discharge. It does cover a very small number of cases where there is no one who can give a valid discharge for the payment of money on behalf of the child and to allow that payment directly to them without requiring the parent or whoever else has custody to run off to court and be specifically appointed.

Mr. MacQuarrie: The other exception, of course, would be where a guardian is appointed and presumably payments were made to the guardian. Are they made on the basis of the will or as directed by the will or when the will says you pay it to the person who is given the responsibility in the will and who can give a valid discharge under the will? I tend to get a little confused with the application of this section in certain circumstances.

Mr. Renwick: If I can dispel the confusion, the way that I thought it would operate would be that if a trustee under a will had occasion to pay moneys to a child and had the usual provision that they could pay it to the parent or guardian of the child--which is another interesting use of the term "guardian"--the parent or guardian of the child in its traditional sense of the term, in order to get a valid receipt, that is simply to permit the trustee to get the valid receipt. I think the parent then receiving that money, it is not that parent's money and I would assume that if there had been a guardian appointed, that guardian would be responsible for that money and property. That is the way in which I would see it.

On the other point about the term "lawful." I do not pretend to have considered it until it was raised by Mr. Davis this morning, but I do think it is important that anybody paying over property or making delivery of property, should make certain that they pay it to the person who is entitled to receive it. I do not

think it hurts to have the word "lawful" in there. It puts the payer in the position where he must ascertain that he is paying the right person.

In that sense I am not worried too much about the introduction of the word "lawful" in the various places it appears in subsections 3 and 4.

12 noon

Mr. Chairman: Mr. MacQuarrie was dealing with basically one point but Mr. Lockie was really dealing with another point of adding the words, "in a year," deleting them from lines four and five and placing them twice prior to that. Are there any comments with regard to that comment for clarification?

Mr. G. W. Taylor: I think, Mr. Lockie, in regard to the feature you are adding in, "in a year" after "\$2,000," it was considered that "in a year" modified both of the \$2,000 features by being at the end, meaning a maximum of \$2,000 of personal property or cash. Having put the modifier "in a year" at the end of the run of words, the total feature would be that there would be only \$2,000 paid over in this form, and not \$2,000 in the form of a double \$2,000 of both personal property and cash. That is the reasoning behind it.

Mr. Lockie: You are suggesting you might be able to pay \$2,000 in personal property and \$2,000 in money?

Mr. Chairman: Yes, it has a possibility of being interpreted that way. That is why "in a year" came at the end of the wording before you moved into the subparagraphs by alphabetical.

Mr. Spensieri: If a child holds a lottery ticket and he wins \$2,000 in money and \$2,000 in bicycles and other things, do you mean in that particular year a parent could not validly issue a receipt for both the \$2,000 in cash and \$2,000 in chattels? I think this was the intent of the section, to clear up those fluky cases where, say, Wintario could not give money to a child who held a ticket, and it would be put in trust for years before the child saw the money. I thought if this was what we were trying to do, the money and the personal property would have been cumulative. Is that not the intent?

Mr. G. W. Taylor: We are misunderstanding your position, Mr. Spensieri. Are you saying it is two and two or two in total?

Mr. Spensieri: I would have thought it was two and two.

Mr. G. W. Taylor: No, the intention is to be two in total rather than two and two.

Mr. Elston: The same question is echoing around here. Where does this \$5,000 fit in? If we have \$2,000 per person per year, how do you then work on the \$5,000 total? Is that if there are three children you can only get your hands on \$5,000 or--

Mr. Chairman: Upon my reading of this originally several weeks ago, it was \$2,000 per year to a total of \$5,000 overall. If it was 10 years, there was still a total of \$5,000 because the total value--

Mr. Elston: In other words, no matter how long the person may have custody or charge of the child, he will only be able to issue a receipt in any event up to \$5,000, which will force him to go to a court to have--

Mr. Shipley: It is \$5,000 with respect to the same obligation, so if he gets \$10,000 under Wintario or \$2,000 under Wintario and \$3,000 under a legacy, he gets--

Mr. Elston: I understand.

Mr. MacQuarrie: And it would be per child.

Mr. Chairman: Where is that separate obligation again?

Mr. G. W. Taylor: "The same obligation shall not exceed \$5,000" is in the last line of section 52, meaning the same obligation so that you still have a maximum of \$5,000.

One of the basic features of the section is to allow these minimal payments to a person in lawful custody of a child but, if it gets larger than the \$2,000 or \$5,000, to force them into seeking the guardianship order we talked about earlier. So there is provision to move some funds but not the total ability to continue moving funds year after year, without going back to the court and putting forth a situation where a guardian could be appointed. That was the basis of this.

There are similar provisions, in depth, where you can make some immediate payments. I think it would be \$3,000. There are other pieces of legislation that allow for immediate movement of funds, but not the total movement of masses of funds.

Mr. Chairman: Mr. Spensieri, are you satisfied with that?

Mr. Spensieri: I think I understand that a little better, but it leaves open the question of the wisdom in today's values of a \$5,000 ceiling and a \$2,000 amount per year. If it had been cumulative, at least I could have seen some--it is a policy matter and I don't suppose--

Mr. G. W. Taylor: Once you have done that \$2,000 and \$2,000 up to the maximum of \$5,000, the purpose of it is that, before you can continue doing that, a guardian is appointed so you then have control over these funds in the normal sense. If it happened to be a situation where it was \$100,000 Wintario ticket, the example you used, for the first \$2,000 that's fine, the child or the person who has lawful custody, but as to the balance of the \$90,000, please get a guardian.

Mr. Spensieri: The real problem is that for \$5,001 you are forcing the appointment of a guardian. That is basically what I am getting at. There doesn't seem to be any--

Mr. G. W. Taylor: But that is a problem with all of them. You are going to get a notch provision, or some limitation.

Mr. Chairman: Could you clarify for me this word "obligation"? Would you please define it?

Mr. Shipley: The obligation refers to the duty to pay money, or deliver personal property to a child. As it starts out at the beginning, "Where a person is under a duty to pay money or deliver," then it is with respect to that obligation. The same person may be under different obligations to pay. He may be under an obligation to pay money to the child under a legacy, and he may be under an obligation to pay to the child under insurance proceeds, and he may be under another obligation to pay for some other reason, whether it is Wintario or some other property the child is entitled to.

Mr. Chairman: So each duty upon him creates a new \$2,000 or \$5,000 ceiling, as the case may be?

Mr. Shipley: Yes, each source.

Mr. Lockie: I wonder if two separate clauses in a will would amount to two obligations?

Mr. Chairman: Certainly, those are different sources. Clauses 3(a), 3(b), 3(c) create three different obligations.

Mr. MacQuarrie: I can still see a certain conflict between this clause and the ordinary application and wording of many wills.

Mr. Chairman: There are practical examples. Quite often, there is a standard catch-up. Where one parent has preferred several others, he may, to even things out, leave specific bequests, specific clauses, of \$20,000 to each of several children to level it up, and then a residuary clause to "all my issue," weekly per stirpes, and so on. Therefore, you certainly have created at least two, or certainly the clause above, which is a specific sum of money, and the residuary share of the residue down below. At least, I would assume two different obligations.

12:10 p.m.

Mr. Lockie: I wonder if that was the intention of the draftsman.

Mr. Chairman: Well, I certainly would not want to be forced to go into surrogate court or the Supreme Court for a construction of a will each time I struck that.

Mr. Lockie: My own view would be that a will would create one obligation, but obviously there is some disagreement on the logic of that.

Mr. G. W. Taylor: I can't assist the members here other than that I might come to the same conclusion as Mr. Lockie. It may be a word that at some time will have to be defined, but I would

consider a legacy to be one obligation also, even if the sources were different paragraphs under the will or different sections of the will. I think that would be considered one obligation, getting back to the situation where the intention was to limit the amount of funds going without receipt and without a guardian being appointed, even though it may conflict with some of the features of a will. There are features in a will, the passing of accounts, the return visits to the court, that impose certain restrictions on the duties of trustees and executors in the will situation.

Mr. MacQuarrie: But to my mind, they have to comply with the payout provisions of wills, particularly when there are infants or minors involved and they are getting income and capital with power to encroach and all the rest of it to satisfy needs. There is automatically then a need to appoint a guardian for purposes of getting that money over for the benefit of the infant.

Mr. Shipley: This applies only where no guardian has been appointed.

Mr. MacQuarrie: Well, in most cases, no guardian has been appointed. It might be that we can get into the testamentary appointment of guardians later on, but then you have the 90 days and you have to make your application and go through a lot of whoop-de-do to get over what started out as a very simple thing with specific directions to a trustee to do certain things with certain money. Then he finds under this bill in trying to pay out a minor, that he is in a bit of a straitjacket unless he gets a guardian or sees a guardian appointed.

Mr. Lockie: Mr. Chairman, I think Mr. MacQuarrie's problem is that he envisages this as taking precedence over the provisions of a will or a trust document. I don't think that is intended, and possibly it would solve his problem if it were simply stated somewhere that nothing in this section impairs the right of a trustee under any other document.

Mr. Spensieri: If this is one of the exclusive statutes for a child, would it not be a logical consequence that it would impeach another less specific statute or statutes of a more general nature?

Mr. Lockie: But a will or a trust document specifically directing a trustee to dispose of certain property in a certain manner and saying he can pay it to any person, pay it to the infant, pay it to the guardian or pay it to a person who has custody, is directed to the specific individuals, and in my view, is quite a bit more specific than this legislation. So I wouldn't think there would be any question that this would take precedence, but perhaps it could be stated that it does.

Mr. Spensieri: It may be an unintended result.

Mr. Elston: As Mr. Shipley said, there is nothing to prevent that trustee from making the payment out, but the receipt for that cannot be given by the person who lawfully received it. I guess that is the point you are making about the \$5,001 situation.

I tend to support the idea of Mr. Spensieri and Mr. MacQuarrie that when it comes to getting a release for that trustee he has not got a legal release for any more than \$5,000 under the provisions that are here that apply directly for any child who comes under the purview of this act.

Mr. Lockie: If that is the result it is a very unfortunate result, and I do not think it is intended.

Mr. Chairman: What is the rule about specificity taking precedence over the general statute. Is there any way that we can clarify? We have two solicitors here, slightly differing on which is more specific.

Mr. Mitchell: I see, Mr. Chairman, by 52(1), that it doesn't matter who in the devil has to pay the money. They can't give any more than \$2,000 in a year and a maximum of \$5,000 without their becoming a guardian.

People are referring to, say, executors of a will and so on. How do they get around this clause if they are given the task by a will of paying to a certain person? According to this clause, they can't do it.

Mr. Renwick: I read this as solace to the person who finds himself in a position with a duty to pay. If he comes foursquare within this clause, he can make that kind of a payment. If he doesn't come foursquare within this clause, he has to look to some other authority under which he can make that payment.

I don't see that this is exclusive for everybody who has a duty to pay money, I don't see this as the exclusive, binding clause under which the payment can be made. I would have been concerned about that if the words under this subsection in respect of the same obligation were not there because "under this subsection," to the extent that it is under here, that's fine. If it is not, then you have to look to some other authority to make your payment. You either have to go to court, or you have to look to the will or whatever. But if you use this, you are stuck with that limitation. That was the way I read it.

Mr. Chairman: So you are agreeing with Mr. Lockie, and I believe the intention of the drafters, that the will would be more specific and could pay out any sum. An executor or trustee with the proper wording could pay out any sum.

Mr. Renwick: I just don't see this as affecting that at all.

Mr. MacQuarrie: I have some very serious misgivings because the language of this section is so express and explicit where a person is under a duty to pay money or deliver personal property to a child; and what imposes more of a duty than a will on an executor or trustee. Then it goes on to reinforce that aspect by saying that it doesn't apply in respect to money payable under a judgement or order of the court. So you are either in the position of having to get an order of the court or trustee or,

alternatively, have a guardian appointed who can assume responsibility for the assets of the child.

Mr. Spensieri: If you said a person is under a duty other than a testamentary duty to pay, wouldn't that cover it?

Mr. MacQuarrie: It's a question of a discharge then--you know, 5,000 bucks--

Mr. Mitchell: Are the operative words here "a person"? I just mentioned having an executor of a will, and so on. Maybe, on second reading, I see that you are not. You are saying you have person A, who is not officially a guardian but has some responsibility to pay \$2,000 in a year. Maybe that is not an exclusive statement because it then allows a person who is the executor of a will to pay \$2,000 as well. It may also allow somebody else who has a responsibility to do so. Maybe the operative words are "a person." Is that the way I should read it?

Mr. Elston: I think they have agreed about there being more than one source. I don't think that's a problem. The problem we are talking about is when the executor or trustee has an obligation to deliver income from a fund that has accumulated. Maybe he is supposed to invest the fund for the benefit of the child and pay out the income of that fund in the year to the child.

12:20 p.m.

What Mr. MacQuarrie and Mr. Spensieri have raised is the fact that he may only be able to pay out, under the provision here, a total of \$2,000 and receive a discharge from the person who pays, unless there is an appointment of a guardian under the provisions of this act. That is the concern.

Mr. Chairman: Whereas under the will he is instructed to pay what amounts he felt.

Mr. G. W. Taylor: But, again, to qualify that, because that is excluded, is the fact that under the will he has the obligations as an executor--certain legislative duties, statute duties--as well as certain duties that are set out as to what will release that executor or executors in regard to the terms of the will. So there may be a provision in the terms of the will that will relieve the executors from that duty so that the terms of that will will not be in conflict with this section.

This just is a section that will allow payment where there is a duty, and they can deliver it to one of these people in (a), (b) or (c). It just tightens up a situation where there probably are no expressed conditions which a will might have.

Mr. Elston: I think I would have to agree with Mr. MacQuarrie's concerns about that. I think that is not really the way this reads. I am not upset if the decision has been made that for every time there is a sum in excess of \$2,000 which must be paid out in a given year to a person who is a child, a court order must be obtained to pay that out to his guardian. That is all well and good, but if that is what we are saying, then it ought to be

very clear here unless we intend to provide a certain exemption. I just want to make it clear.

Mr. Chairman: What it gets down to, Mr. Taylor, is you are taking the position of what is clear to you, and at least three and probably four solicitors here are expressing grave doubts as to whether it clearly states that. You are saying that the duties of an executor and trustee under a will override this, are paramount to this. They are saying they question strongly if that is so, and I agree with the three or four solicitors. I have grave doubts about advising the trustee how much he should pay out.

Mind you, the wills I prepare automatically have those clauses in them to keep out the official guardian and so on. They have them in here, but I question, if there is \$8,000 to be paid out to a student of university age, how far the release goes. Does it only go to cover me for \$2,000, or does it go for the whole \$8,000?--which is what you people are questioning, correct?

Mr. Spensieri: What would happen to a \$5,000 diamond ring? Would you have to deliver it?

Mr. Chairman: Is it an answer to break at this point? There are several on the committee who have meetings which started at 12 o'clock, and we are within five minutes of breaking. We seem to be-- I will not call it an impasse, but we certainly do not have a meeting of the minds. Can we break at this point and resume at two o'clock?

I am sorry, Mr. Lockie, that we have not proceeded further with your area of expertise. Is it convenient for your people, or for you to have someone else here with expertise in this field? As you can see, you are needed.

Mr. Lockie: I think somebody can be here, possibly myself, shortly after you reconvene, especially if you reconvene as promptly as you did this morning. If I cannot, I will try to have Mr. Baston.

Mr. Chairman: That is the usual punctuality of the committee. The meeting is adjourned until two o'clock.

The committee recessed at 12:26 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHILDREN'S LAW REFORM AMENDMENT ACT

THURSDAY, JANUARY 14, 1982

Afternoon sitting



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Treleaven, R. L. (Oxford PC)
Andrewes, P. W. (Lincoln PC)
Breithaupt, J. R. (Kitchener L)
Eaton, R. G. (Middlesex PC)
Elston, M. J. (Huron-Bruce L)
Gordon, J. K. (Sudbury PC)
Laughren, F. (Nickel Belt NDP)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Piché, R. L. (Cochrane North PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M (Yorkview L)

Substitution:

Hennessy, M. (Fort William PC) for Mr. Andrewes

Clerk pro tem: Nokes, F.

From the Ministry of the Attorney General:

Beecroft, D. A., Counsel, Policy Development Division
Shipley, A. Q., Counsel, Policy Development Division
Taylor, G. W., Parliamentary Assistant
Tucker, A. S., Legislative Counsel

Witnesses:

Lackovic, D., Member, Abducted Children's Rights of Canada

From the Canadian Bar Association (Ontario Branch):

Lockie, P. E., Chairman, Committee on Children's Law Reform, Wills
and Trust Section
Preston, R., Chairman, Family Law Section

LEGISLATURE OF ONTARIO

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Thursday, January 14, 1982

The committee resumed at 2:17 p.m. in committee room No. 1.

CHILDREN'S LAW REFORM AMENDMENT ACT
(continued)

Resuming consideration of Bill 125, An Act to amend the Children's Law Reform Act.

On section 52:

Mr. Chairman: Gentlemen, may we reconvene? When we left, we were in the middle of section 52. I do not recall exactly where we left off, except that the ministry was to consider something over the noon hour. Could you help me out, Mr. Taylor?

Mr. G. W. Taylor: We have considered the wording and it is still satisfactory to the staff of the ministry. We do not foresee the difficulties some of the members do. They have suggested some alternative wording, but I fear the alternative wording could just put us in the same spot. Some will agree and some will disagree with what is being done, but I think the wording as it sits, according to Mr. Shipley, is satisfactory, and is achieving what is desired.

Mr. MacQuarrie: Well, what is desired? It seems to me if the wording is achieving what is desired, what is it that is desired?

Mr. G. W. Taylor: The desire is, as we explained this morning, the feature of allowing someone who has a duty to pay to be able to do so, rather than providing for it in another document. As you are well aware, in other documents there is provision and the document controls, or the law regarding that. This is an ancillary section to the existing laws, and existing abilities of those who are under a duty to pay, so that they can pay up to \$2,000, where there is no guardian, without necessity of making the individual apply for a guardianship of the property.

This is just to ease the performance of those duties. This is not meant to control the testamentary situation, which is controlled by the laws governing wills, trusts and estates and the testamentary document itself. There is a very large body of law on it, I might add. We are not trying to codify or control that. We are looking at situations other than that.

Mr. MacQuarrie: The problem that remains with me is the question of supremacy of legislation. When you have a very specific clause and a very specific bill relating to children's property and children's property rights, how does that relate to a section in another statute that might not provide otherwise?

I realize there are various rules applying to supremacy or to conflicting clauses in legislation. Is there not a potential conflict here? That is the question in my mind. I must say that anything I have heard so far has not given me that much reassurance.

Mr. G. W. Taylor: I do not hold myself out in any way as an expert or as having thorough knowledge of the estate field, as it is generally categorized. But it is not the intention of this statute to impede or impinge upon any part of the law in that regard. It is a much earlier act, or one that is an extra, or one that is taking into consideration situations that are not covered to allow for that provision. I cannot express it more clearly than that.

Mr. MacQuarrie: We have the assurance of the ministry, then, that this statute in no way will interfere with the powers of a trustee under a will.

Mr. G. W. Taylor: No, it does not. If I continue on and qualify that statement, you will come back with another qualification.

Mr. Chairman: Mr. MacQuarrie has put it as a statement, that it is the intent of the ministry that the wording of a will is supreme over this section.

Mr. Shipley: If the will gives the power to somebody, or gives the right to someone to give a valid discharge for money being paid, then the will would take precedence. That is our intention.

Mr. Chairman: Thank you.

Mr. Mitchell: Similarly, what they are doing under that will would have no affect on what we are doing here?

Mr. Chairman: They are saying that what is said under the will has priority over this.

Mr. Mitchell: When they use the word priority, all I am concerned about is that this, nonetheless, does not bother this.

Mr. Chairman: No. The will takes supremacy. The wording in the will you go by. If there is no wording in the will, if it does not set out in the will who can give a discharge, then this act comes into effect and sets out who can give a discharge.

Mr. Elston: You would have to have an intention displayed in a place in the will to contradict the provisions of this legislation, and if you were being a safe sort of draftsman, you would say "notwithstanding the provisions of," I presume, to be very clear about your intention as a testator.

Mr. Chairman: You would affix a copy of Hansard of today to each will you draw?

Mr. Elston: No, I would not affix a copy of Hansard of today.

Mr. Mitchell: If I may, Mr. Chairman, it has been stated that the will is supreme, or has priority, but that does not necessarily mean that money under a will is the only source of revenue that could be forthcoming.

Mr. Chairman: That is correct.

Mr. Mitchell: All right. The fact that they are getting some money under a will does not say that they still cannot get the money under here. Is that right?

Mr. G. W. Taylor: Yes.

Mr. Mitchell: That is all. The word "priority" was used and that somewhat bothered me.

Mr. G. W. Taylor: The use of the word "priority" was that if there are certain conditions in the will, those conditions apply. If, for some reason, the wording in the will--and this is a qualification I did not want to use before, because you can always qualify every general statement you make. If, for some reason, in the drafting of the will, the executors did not want to perform their function of giving over some money, and they were questioning, they could then fall under this section.

They could say, "Okay, this section follows," because it is the person giving out the money who wants that protection. "Have I given out that money to somebody who can give me the receipt, somebody who can legitimately or otherwise contest my position? Have I in any way been fraudulent, derelict or negligent in my duty as the person who has to pay out to somebody?"

Mr. Mitchell: So that this \$2,000 is not inclusive of all sources is the question.

Mr. G. W. Taylor: No, not at all. This is just for those who do not have any other feature, of giving a receipt.

Mr. MacQuarrie: Let us put the situation in a different way. Assume you have a very tight-fisted executor. You have specific instructions in the will for him to do certain things, but he thinks the testator has been too liberal, so he says: "Look, I am just going to give you \$2,000 a year up to \$5,000 and this is my reason for it. I refer you to section 52 of the Children's Law Reform Act," and that is it.

Mr. G. W. Taylor: That does not help in the respect that if anybody does that, you always have the provisions if you are looking at a testament or document to obtain the instructions of the court. Naturally, you are going to say they cannot look at the Hansard of the day to see what the intention was, but we are hoping this in no way limits testamentary features and the law on testamentary rules.

Mr. MacQuarrie: I appreciate your use of the word "hope."

Mr. G. W. Taylor: I suggest we hope all judges will apply the intention, but since one cannot look at Hansard, we have all

had occasions as practising lawyers where we have seen the bald words not interpreted as we had hoped or expected they would be when they are delivered in this Legislature or other legislatures.

Mr. Chairman: Are there any other comments with regard to section 52?

All those in favour of section 52, please raise their hands.

All those opposed to section 52, please raise their hands.

Four voted, two each way, and three abstainers. Of course, they cannot abstain. On the other hand, they cannot be forced to vote.

Mr. Piché: I think you have to vote in committee.

Mr. Chairman: No, I differ. I believe, and I do not know whether it is in the standing orders or in Beauschene, a member cannot be forced to vote. He may not abstain, but he cannot be forced to vote.

Mr. Renwick: I think our problem will be solved if you call the vote again.

Mr. Piché: No vote is usually a negative vote, but it does not say that in the rules of these committees.

Mr. Chairman: However, can there be a tied vote when you have three people who did not vote?

I don't believe, Mr. Renwick, I can hold it again. There are new members, but at the time--I don't believe I can hold the vote again.

Mr. Renwick: With the consent of the committee, I think you can.

Mr. Chairman: With the consent of the committee--is there unanimous consent of the committee to hold that vote again?

Mr. Piché: I hope the committee will, because we had some confusion on the first vote. Now that the matters that were in confusion have been clarified, I would suggest we vote again.

Mr. Chairman: Is that satisfactory with all members? Is it unanimous that the vote be held again? The Liberals? The NDP? Fine, thank you.

All those in favour of section 52, as set forth in the bill, please raise their hands. All those opposed? The vote carries six to three.

Section 52 agreed to.

2:30 p.m.

Mr. Chairman: I hope the rest of the bill is not this way because it certainly will never reach its conclusion by tomorrow night.

On section 53:

Mr. Renwick: Mr. Chairman, I have an amendment to section 53.

Mr. Chairman: Mr. Renwick moved that the following words be inserted after the word "child" in the first line of section 53 "or a parent with whom a child resides or a person who has lawful custody of a child who receives and holds money or personal property referred to in subsection 1 of section 52."

Mr. Renwick: Mr. Chairman, I draw the attention of the committee to section 52(4), which states, "A parent with whom a child resides or a person who has lawful custody of a child who receives and holds money or personal property referred to in subsection 1"--you will note the similarity of the language I have extracted from that clause--"has the responsibility of a guardian for the care and management of the money or personal property."

Since the person described has the responsibility of a guardian for the care and management of the money or personal property, then it seems to me that person should have the same obligation with respect to passing the accounts as is provided for a person who is the guardian.

I do not claim any particular merit for this amendment. But I had a sense that this point was raised during one of the presentations to us. I also believe it has validity for the reason I have stated, that if the person does have the responsibility of a guardian for the care and management of the money or personal property, then it would seem to me that person should be required to account by passing his accounts in the same way as is provided in section 53.

I think the point is clear and I have no further comment, Mr. Chairman.

Mr. Chairman: Thank you. Any other comment with regard to Mr. Renwick's amendment to section 53?

Mr. MacQuarrie: Mr. Chairman, I feel the proposed amendment would complicate the situation in practice, particularly with respect to parents or people who have lawful custody when they are holding on the infant's behalf, presumably, a limited amount of funds. If you are in the situation where the only money coming to the child is coming under section 52, and you have a total of \$5,000 per under a given obligation, to ask a parent, for instance, if the father goes and the mother survives, to go to the court to account for this money I think would be asking a little bit too much and would be impractical under the circumstances.

Mr. Spensieri: Mr. Chairman, what Mr. MacQuarrie says has a great deal of merit. However, considering the fact that you may

have a multiplicity of sources, and considering each source carries a ceiling of \$5,000, you may, in effect, arrive at a situation where the recipient child will be receiving on his behalf a substantial amount of funds, which, it seems to me, ought to be subject to the same degree of strictures and accountability as is being contemplated by Mr. Renwick's amendment. While Mr. MacQuarrie's point is well-taken, section 52(1) was intended to set up a summary way of administering relatively insignificant amounts, because I recognize the potential that these amounts could become very significant I would like to support Mr. Renwick's amendment.

Mr. Chairman: Thank you. Other comments?

Mr. G. W. Taylor: Mr. Renwick, legislative counsel and Mr. Shipley have indicated that section 52(4) was inserted in contemplation that that was the control you had asked for in section 53. They believe it has been provided for within the definition of section 52(4), and therefore the words you have suggested aren't necessary, considering that they have already been included in the statute.

Mr. Renwick: Is that a short way of telling me that the person who has received that money by virtue of these words can be required to pass his accounts?

Mr. G. W. Taylor: Yes, that is so. That person, the parent with whom a child resides or a person who has lawful custody of the child who receives and holds money (inaudible), has the responsibility of a guardian--and those are the control words: "of a guardian"--for the care and management of the money of the person. Then a guardian for a child may be required to say that he thinks those are related--

Mr. Renwick: I can't make that jump myself, but I would like to think that was so and that my amendment was quite unnecessary, if so. I do not believe, however, that that could happen. My only response to Mr. MacQuarrie is that I have tended never to treat the de minimis argument as one which would allow a parent in any way to misunderstand that the property of his child is not his property and is not his to play with or to use as he chooses.

The parent will in most cases, of course, use it for the benefit of the child and for necessities or other purposes and there is no problem. But there are also circumstances which I am sure you may have been aware of and which I certainly have been aware of where at least the judgement of the parent with respect to what was done with the money by way of investment was significantly short of the standard that would be required of the court. Or, indeed, in many situations the parent might take the money and simply commingle it with his money and just treat it that way.

I think that by virtue of being in the statute--whether it's there by reason of the interpretation the parliamentary assistant states is so or by reason of my amendment--the very existence of it will at least indicate clearly to the parent that it's not his or her money. And I would consider it.

In any event, I would appreciate any comment our colleague Mr. Lockie might care to make about that.

Mr. G. W. Taylor: Before Mr. Lockie does there is one other feature, Mr. Renwick. It is suggested that you insert that in section 53. You might then bring about an amendment similar to sections 54 or 55, where again, guardian of the child, section 58 again, where it keeps appearing, because some of those features are in there in the responsibility of the other--

Mr. Renwick: Your first argument, sir, would create that result. My amendment would not create that result. By separating out the persons who would be required to pass accounts and then adhering simply to the term "guardian" in sections 54, 55 and elsewhere you do not apply those provisions to the group of persons to whom I have referred.

I don't think it is necessary to do that, but I have always felt that a child should have the residual right when the child came of age, if somebody else doesn't do it, to ask his parents to account for the child's property, which has been in their possession. I felt that that was very important in cases either of negligence or of misappropriation, whatever the best of the intentions may be. Five thousand dollars may be a little bit of money in some people's eyes; it's a hell of a lot of money in a lot of people's minds, particularly at 20 per cent interest rates.

2:40 p.m.

Mr. MacQuarrie: I think in a good many instances a person should bear in mind, particularly when you have a surviving parent looking after a number of children, that any funds advanced for the benefit of the children and held by their parent are quite often used for the care, maintenance and education of the children, and any end funds are in fact used to a large extent for those purposes. I'm putting the extreme sort of situation, I realize, but to have a parent account for pairs of shoes and a portion of the grocery bill and this sort of thing is asking, I think, quite a bit.

Mr. Elston: I still have some difficulties in making the connections from section 52(4), which deals with responsibilities, to tie in with section 53, which is a permissive section; there is no onus there. It's sort of cute language, I guess, to accomplish what your intention is. Sometimes I think we may be, in this bill particularly, so intent on being nice in the way we draft our legislation that we really obscure the intention that we have tried to effect. I can remember any number of cases where judges have written decisions that talk about the language that is used and how it might have been more direct in expressing the intent they found and that would have addressed the problems of the parties who came before the court before they had to take that step.

I just can't help saying that I think that in our dealings with these very few sections we have dealt with so far we have seen difficulties in the precision of language that, although it might be technically correct from a drafting standpoint, is certainly not letting the members of the committee feel at ease that they express the intent which is desired.

I think, maybe, that we should take the step of being clearer. If we want the person who informally receives a property or money under section 52 to have the same obligation as to passing of accounts that are described for a guardian under section 53, and then if we further go ahead and want sections 54 and 55 to apply to that informal obligation under 52, then I think we ought to say that and say it clearly and not be so nice with our wording, because it's obvious from the differences of opinion that were expressed by various members that this intention is not as clear as it ought to be. I think that maybe Mr. Renwick's amendment will help clarify one aspect of it, but I'm not sure that's going to go far enough in dealing with the questions of how far we're going under sections 54 and 55.

Mr. Renwick: I don't want my amendments to apply to sections 54 or 55. I will leave it to somebody else if he wants that to happen.

Mr. Lockie: Mr. Chairman, it seems to me that it is intended that sections 54 and 55 apply to the person who gets this money in the informal manner. I also believe that section 52(4) is intended to create that result. My only concern is that 52(4) uses the wording that the person has the responsibility of a guardian for the care and management of the money or personal property. Now, care and management are not the extent of his obligations; he also has obligations to account and presumably to pay it to him when he gets to 18, et cetera.

It would seem to me that the easy thing to do would be to say that in section 52(4) he has the responsibility of a guardian with respect to the money or some broader term, just saying he is a guardian in all respects in respect to that money, and then sections 53 and 54 and 55 will apply to him. It is the use of the words "care and management" which to my mind can be interpreted to somewhat limit his responsibilities that creates the problem.

Mr. Chairman: Any comments? Any other comments with regard to Mr. Renwick's amendment to section 53 with the addition of the words after the word "child"? If there are no other questions or comments, all those in favour of Mr. Renwick's motion, please raise their hands. All those opposed, raise their hands. The motion fails, six to four.

Are there any other comments with respect to section 53? Shall section 53 carry?

Section 53 agreed to.

Mr. Chairman: On sections 54 to 59, inclusive, are there any comments?

Mr. Elston: Before we get to sections 54 through 59, I wonder if maybe it would not be of some assistance before we get to third reading if the Attorney General's staff take another look at the suggestion that was made by Mr. Lockie in relation to whether or not that section 52(4) is a little bit restrictive, at least consider it. I do not think we can help ourselves much at this

point on it, but I think they really ought to take a serious look at it to ensure that we really are doing what the expressed intention is.

Mr. Chairman: Any other comments on sections 54 to 59, inclusive? Shall sections 54 to 59, inclusive, carry?

Sections 54 to 59, inclusive, agreed to.

On section 60:

Mr. Lockie: (Inaudible) yesterday was that, since we are talking about guardian as part of the bill, it would be logical to use the word "guardian" in the initial wording of section 60. My inclination would be to say a parent or a guardian or any other person. I realize it is probably included, but it sounds as though it might not be intended to be included when you are specifically talking about guardians in all the previous sections and then suddenly in section 60 you leave them out.

Mr. G. W. Taylor: Again, it is intended they be included in the general words "or any other person." I think generally in the interpretation of statutes, when you say "any other person" that is fairly inclusive of all individuals in the interpretation sections. I think that is a general rule of law when you have such a broad category as "any other person."

Mr. Chairman: May I address a question that may be answered by previous questions with regard to section 60(1), the application of the parent of a child for an order disposing of, for example, land. I made a note here and I am reading it, "Why not guardian?" How about a guardian making an application to the court.

Mr. Renwick made the point before as to the good title. I believe he made that earlier this week as to accepting and making good title on the land. Do you have any further comment on that, Mr. Renwick?

2:50 p.m.

Mr. Renwick: No, I can understand that it might be helpful to insert the word "guardian" in this, but it is a long time since I have done any of that kind of conveyancing. I think it would be the obvious thing I would require if I were taking title to property from the child, but I would ask for the order of the court. Therefore, I think it should be a wide power to apply in order to get that, and the order of the court protects the person then who buys or takes the property. I have no further comment on it. This section is satisfactory to me.

Mr. MacQuarrie: I was wondering, particularly with respect to section 60(1)(b), should it be the sale or disposition of the interest of the child in personal property? I am thinking of a situation where a child is left an operating farm, for example, with machinery and all the rest of it, under the care, management and control, during his minority or her minority, of the parent or even on intestacy, maintaining the place as a family resident. What

about trading machinery and getting rid of machinery, disposing of stock and this sort of thing, where you have livestock sold on a regular basis? It would seem to make things very complicated to go to court every time.

Mr. Chairman: Mr. MacQuarrie, are you referring to section 60(1)(b) or 61(2)(b) or 60?

Mr. MacQuarrie: Section 60(1)(b).

Mr. Chairman: Section 60(1)(b). Okay, I am sorry, I was looking at 61(2)(b).

Mr. MacQuarrie: It just says for an order concerning the sale of an interest of a child in personal property.

Mr. Chairman: I presume the same comments are relevant, whether it be personal property in (b) or real property in (a). You are going to make title by the same procedure one way as the other. I believe the same comments would be relevant. Is that correct, Mr. Taylor?

Mr. MacQuarrie: I was wondering about in situations where a sale is not involved. It could be a trade-in. It could be a number on exchange. It could be a number of things involving the disposal of personal property of the child.

Mr. G. W. Taylor: I will ask legislative counsel to assist you here. I do not know exclusively when you talk about sale, it has to be a sale, and it cannot be a sale where--under the general rules of some of the law, you can have a sale that would form a method of payment, part time, part money, maybe a trade, but there is still a contractual situation called a sale. I do not know whether that assists you in resolving that situation for you, as I know everything might not be just straight clean--one steer for \$80.

Mr. MacQuarrie: Here we get into areas of possible conflict with other legislation. People look at examples they have come across in the past in their own experience, and we see farms that are being held for the benefit of minors and operated as operating farms, and all sorts of situations such as trades, disposal of personal property, and sale of crops, rental of crop sharing agreements and all the rest of it.

An infant has a very substantial interest in it. I am sure you are familiar with that sort of situation.

Mr. G. W. Taylor: Counsel advises me that the source of the wording is from the Minors' Protection Act, which was at one time the Infants Act. There is no change in the general wording or the intent of that particular section--a slight change of the wording, not the intent--and if there are problems at present they are still going to be there. If there are no problems, then they are not going to be there. We have not created any new relationship of a sale that is possible. They are still the same type of sales, and if they have been ongoing with success then they have been there. There is no change in intent.

Section 60 agreed to.

Section 61 agreed to.

On section 62:

Mr. Chairman: Section 62 is testamentary custody and guardianship. Mr. Renwick, you had some negative comments on this section, and the delegating by a guardian of his authority. Any further comments on that?

Mr. Renwick: No, I do not have any further comment on that. I was a little bit concerned about a guardian for a child appointing by will another person to be the guardian, but it is only a 90-day appointment, and I suppose from the point of view of some flexibility it is advisable. It is subject to confirmation after 90 days, or during the 90 days, by application, so I do not have a problem about that.

I must say I stumbled when I read subsection 3, because the appointments mentioned in subsections 1 or 2 are by will. It is a rather strange way to put it. The written appointment signed by the unmarried parent who is a minor is not an appointment by will. I read it several times and I decided that it probably meant what it said, that it is an appointment during the life of that person to appoint someone to have the custody of the child--maybe it is not all that clear. What does subsection 3 mean?

Mr. Shipley: If I could address that one, the problem is, of course, that a minor cannot make a will, so some other provision had to be made to allow them to make an appointment.

Mr. Renwick: This has testamentary effect?

Mr. Shipley: For this very evident purpose.

Mr. Renwick: Yes, I understand, for a very limited purpose.

Mr. Shipley: Otherwise, though, they cannot make a will.

Mr. Renwick: I understand that. A written appointment signed by the parent can appoint the person who will have custody of the child after the death of the appointor. That is interesting. I am thinking of the witnesses and things like that. Apparently if one finds a piece of paper where a person has exercised that power and was eligible to do it, appointing somebody to have custody, that is all that is required.

3 p.m.

Mr. Shipley: I think the problem there is--I wouldn't call it a problem but what we are trying to make equal is that an adult can make a holograph will appointing someone to have testamentary custody with regard to children. We are trying to make it equal.

Mr. Renwick: I understand. Thank you. I appreciate the explanation.

Section 62 agreed to.

Mr. Renwick: I believe we are now out of the guardianship provisions.

Mr. Chairman: Yes, we are.

Mr. Renwick: It may be appropriate to move back to the other sections.

On section 18:

Mr. Chairman: Shall we go back to pick up where we left off yesterday, back to section 18 which was stood down? We have a series of amendments. Having organized them in what I thought was the appropriate order this morning, I come up first with Mr. Elston's amendment of section 18(1a); then Mr. Spensieri's amendment of section 18(1e), and Mr. Renwick's.

Interjections.

Mr. Chairman: Yes, because Mr. Elston's put in a new (a) and moved the existing (a), (b) and (c) down to (b), (c) and (d). Mr. Spensieri then added a new (e), whereas Mr. Renwick's, the third one, is adding a new definition.

The reason I put them in that order is that the two Liberal amendments are dealing with the definitions of "child" and "older child" and I thought they came in a better order of subject matter, leaving Mr. Renwick's, which is a different subject, after Mr. Spensieri's. Is that logical?

Mr. Renwick: Yes. I am quite happy. As to whatever the appropriate lettering is, I can change mine when I move them if any change is necessary. I have two amendments.

Mr. Chairman: Then in your next one, of course, a new definition (e) followed definition (d). In case someone wanted to hassle as to the order received by the chair, that's why I put them in that order.

Mr. Lockie: Excuse my interruption, Mr. Chairman, I wonder whether I may be excused since I have no further knowledge on what you are talking about.

Mr. Chairman: Thank you very much for your assistance, Mr. Lockie.

Mr. Chairman: Mr. Elston moves that section 18(1) be amended by adding the following:

"(a) 'Child' means a child born within or outside of marriage with the exception of any child who has been adopted, who is a minor and is unmarried, and includes a person to whom the parent

has demonstrated a settled intention to treat as a child of his or her family."

Mr. Elston: Perhaps I will just stop there with respect to the new lettering. The amendment, with the exception of the mention of the adopted child, has been taken from the presentation of the Canadian Bar Association family law section, where they recommended that we include a definition of "child" inasmuch as we are dealing with a child under the legislation. It stands as something very logical that we define the person we are dealing with.

Talking about the exception of the adopted child is merely following through on what sections 86 and 87 of the Child Welfare Act are. We decided that if you are going to make this thing stand on its own, you accept or exclude the adopted child automatically from the operation of this legislation vis-à-vis the parent. That is all that those words mean.

We think it is reasonable to have a definition of "child." If it can be effected in a more precise way, we are happy with that but we think there ought to be a definition.

Mr. MacQuarrie: Notwithstanding the explanation given for the exclusion of the adopted child from the application of this particular statute, I feel an adopted child should certainly be included. It is true that an adopted child encounters problems which affect parentage. An adopted child would fall certainly within the responsibility of the parent who has demonstrated a settled intention to treat the child as his or her family.

Mr. Elston: It is I who must confess to not being precise with my intention. The exception is meant to apply to a child of a parent--if I am a parent who has had a child that has been adopted outside of my family, in other words, that I have given up for adoption rather than one whom I have adopted. It is probably the result of my imprecision in the construction that that confusion exists.

Mr. Chairman: Mr. Elston, do you wish to put some new wording to your amendment to clarify that?

Mr. Elston: If I am sure that I can clarify it.

Mr. Chairman: While Mr. Elston is considering that, does someone else wish to comment upon it? I think Mr. Elston's intention is clear at this point. Mr. Renwick.

Mr. Renwick: I don't want to speak to that portion of it because I agree with Mr. MacQuarrie about that. I thought we had abolished the distinction between whether a child is born within or outside of marriage. I thought we had abolished it as effectively as words can in Ontario, the distinction between legitimacy and illegitimacy. Therefore, if I am correct, I think it would be very unwise for us to bring back into this act those words.

Mr. G. W. Taylor: I think, Mr. Renwick, you are correct on that. One must remember in looking at this particular act that

is before you, it is one to amend the Children's Law Reform Act, which is at present there in section 1 of the Children's Law Reform Act as an interpretation of "child" or describes the features of the child. This amendment would be superfluous to what is already in law described as a child under the present legislation. The feature you mentioned about inside or outside marriage is there. It's a child of its natural parents.

Mr. Renwick: My second comment would be, the power to apply to support is the power not only of a parent of the child but of any other person. The closing words of the proposed amendment, that is relating to a person who "has demonstrated a settled intention to treat as a child of his or her family," I have trouble with, because I think it is important that the court be left wide open to determine the question of whether the person applying is in order in applying. Whether the court grants the application is a separate question and I wouldn't want to raise some question about the standing of a person to make an application by some reverse indication that it would have to be a person with some demonstrated settled intention to treat a child as a child of his or her family.

In other words, I have trouble with that definition. With great deference, Mr. Elston, I may have missed the significance of the point. I prefer the way in which the statute is at present drafted on that question.

3:10 p.m.

Mr. G. W. Taylor: I think, Mr. Renwick, you have challenged the area correctly and I can see where Mr. Elston has achieved his definition in some of the other acts, say, the Divorce Act. They expand on the definition of a child. That is expanding on it in regard to the obligation that somebody may have who might not really have those obligations unless you expand on them, such as is stated here, "demonstrated a subtle intention to treat a child."

But in this particular statute you have the situation where somebody is seeking custody and is not being forced into a custody situation or forced into payments. By forcing I mean a litigation situation. That is where the difference comes and we feel that the definition section as presented is equal to what is necessary to carry out the functions of the particular act.

Mr. Elston: Mr. Chairman, perhaps the intention is expressed more clearly by retaining the reference to the Child Welfare Act, sections 86 and 87, as was done in the position paper of the family law section of the Canadian Bar Association in its presentation. I would like to withdraw my amendment as originally put. I would still like to have the question voted on and I would like to have the amendment read as follows, if I may. It would still be under section 18(1) and be lettered (a).

Mr. G. W. Taylor: I might say to you, if I can lead to where you are going, that the definition section of the act at present has the child welfare reference in there at subsection 2.

Mr. Elston: So you are saying it would be redundant.

Mr. G. W. Taylor: Yes, it is already in the initial section of the Children's Law Reform Act at present.

Mr. Elston: Perhaps if it is going to cause a redundancy there is not much point in putting it. I noted that there was no such indication at the time the matter was argued at some length in the presentation by Mr. Preston. I wanted to make sure we clarified any lack of definition, but if that is the case, there is no point in the amendment.

Mr. G. W. Taylor: Counsel believed they are adequately defined already in the act. I did not mention the second child welfare situation because you are only dealing with the amendment as here, so I only presented you with the first part of the definition.

Mr. Chairman: Mr. Elston, that looks after the latter part of your definition as well, the person to whom a parent has "demonstrated a subtle intention" et cetera. That takes care of that. So you have withdrawn your amendment?

Mr. Elston: I will withdraw the amendment.

Mr. Chairman: Thank you.

Mr. MacQuarrie: Mr. Chairman, where is "child" defined then?

Mr. G. W. Taylor: In the first part. The bill we are dealing with is An Act to Amend the Children's Law Reform Act. There is an existing Children's Law Reform Act. The definition of "child" is in the first sections of--

Mr. MacQuarrie: I thought I heard mention of the Child Welfare Act.

Mr. Chairman: It is. In section 1 of part I of the Children's Law Reform Act, it refers back to--

Mr. MacQuarrie: A child is elsewhere defined in the statute.

Mr. Chairman: In this statute, yes, the Children's Law Reform Act.

Mr. Spensieri moves that section 18(1) be amended by adding the following paragraph:

"(e) 'older child' means a child who, on the date of an application or any other proceeding under this part, has attained the age of 10 years and who, in the opinion of the court, demonstrates the capacity to instruct counsel."

Mr. Spensieri: Very briefly Mr. Chairman, the objective of this section is to create a category of children who would, by subsequent amendments which follow from this definition, be given certain rights of representation and participation in the access and custody applications and in other proceedings under this

part. The intent clearly is that if we are talking about a statute that purports to deal with children in these two very critical aspects, then consideration ought to be given to respecting more fully the wishes of a child who is able to demonstrate those wishes.

Comments have been made at length about the lack of wisdom of allowing the whims of a child to be brought before a court in proceedings. However, I guess as a counter to the argument there is always the view that a court will make a determination based on the best interests of the child, which has become the paramount consideration of this part and of this statute in general. Therefore, that issue of the paramountcy of the best interests of the child can only be aided by the presence of an older child in court or in the proceedings and is not going to be undermined in any way.

With the possible issue of burdening additional costs on the taxpayer, I do not see why a statute such as this that purports to give rights should shy away from making at least an older child a party. That is the intent of this definition.

Mr. Renwick: Do I understand, Mr. Spensieri, that the intention of this amendment would be that further on in the bill the older child would become an actual party to the proceedings?

Mr. Spensieri: To certain types of proceedings. For instance, in applications, on the section dealing with notices that have to be given, or in applications to vary.

Mr. Renwick: Let me get at it another way. Would the older child as of right be entitled to counsel? Is that what you are saying?

Mr. Spensieri: It is consequential, yes. That would follow from the definition and from amendments I intend to introduce.

Mr. Renwick: Oh, further amendments.

Mr. Spensieri: Yes.

Mr. Renwick: I don't have those, I guess, or do I? I have one further one of yours dealing with this particular matter.

Mr. Spensieri: You have 19, 20 and 21.

Mr. Renwick: I do not have 21. I have no amendment for 21.

Mr. Chairman: There is a motion that has no name at the top. It does not have a mover. Is it section 21(1) you are speaking of--"where the parent of a child or older child" et cetera?

Mr. Renwick: I don't have that one.

Mr. Spensieri: I just assumed because these were all sequential amendments, my name on the first would suffice.

Mr. Chairman: There is another one. Section 21(2) is also

Mr. Spensieri's. I had marked it with a question mark. Perhaps you are missing that one as well, Mr. Renwick?

Mr. Renwick: No I, have that one. The only one I don't have is section 21(1). My colleague has just given it to me.

Mr. Chairman: Does everyone have the section 21(1) we are referring to? It is relevant to Mr. Spensieri's present amendment relating to the older child.

Mr. MacQuarrie: I don't have the amendment, Mr. Chairman, but I follow the--

Mr. Chairman: He wishes to define "older child" so that it may be used later on to add in an older child with certain rights, for example, in section 21(1).

Mr. MacQuarrie: As I understand it, Mr. Chairman, this definition is being introduced to permit the bill to provide for individual representation on behalf of a child. That seems to be the only reason why the older child is being distinguished from a child in general.

Mr. Chairman: Well, yes and no. Section 21(1), if you look at it, does say, "give an older child a right to apply to a court regarding custody." It goes further than having representation. It gives them the status to apply to court. It goes a little further than you are saying, but maybe Mr. Spensieri would expand. Maybe you are correct in what you do say.

3:20 p.m.

Mr. MacQuarrie: In most custody applications the wishes of the older children are taken into account. The child can act in that case as his own witness. I thought this bore primarily on the question of representation.

Mr. Spensieri: The crux of the argument is the power to initiate proceedings. By making an older child a party or a potential party, undoubtedly always through counsel, because that is a necessary corollary of an older child being a party, it seems to me in order to give full effect to this act, there ought to be certain powers of initiating proceedings to amend custody orders and conferring some very substantive rights on what I call the older child. I have tried to develop an objective test for the older child by giving to the court the ultimate discretion as to whether that child has the capacity to be before a court and to initiate proceedings. That is really the essence of what I am arguing for.

Mr. Mitchell: When you say "court," you are talking about the court and/or its advisers who are going to make the judgement on whether that child--I have some difficulty with this age of 10 years. I quite appreciate you are trying to look out for the best interests of the child and you feel there comes a point in time when a child can demonstrate those capabilities, but I am not sure that 10 years of age--

Mr. Spensieri: Ten years is only one of a two-pronged test. You have to meet the chronological test first and then a further test of capacity.

Mr. Mitchell: Yes, but then I am not too sure the judges necessary qualify to make that decision, although I gather it is done in the courts today.

Mr. Spensieri: Mr. Mitchell, I could say there that in any court, I believe criminal and civil, it is the judge and solely the judge who decides what evidence will be taken from a minor and what weight it will be given. Am I not correct, those of you who are more litigious than I am?

Mr. Chairman: It doesn't mean we are more litigious, but that is correct.

Mr. Mitchell: But as an individual I might find their judgement is not always correct. I think back to situations where judges have deemed minors to be of sufficient age to be charged in adult court in certain actions and I am not sure their decisions were correct in those situations either. I have some sympathy for saying we have to recognize at a certain point after examination a child might be able to do that. My initial reaction to it is--I don't think any one of us here who has a family, and I have five kids--I wouldn't want to say that mine at 10 years of age were capable of directing counsel and I wouldn't want to be the one to even judge it. Yet who would be closer to them and more knowledgeable of them?

Mr. MacQuarrie: Mr. Chairman, I have a certain amount of sympathy for the objections here, that everyone is entitled to counsel and to representation, but in the case of children, I find it very difficult to say at what stage in the child's development, whether chronologically, mentally, or otherwise, that child is really and truly capable of instructing counsel. A child at 16 might want to sell all the assets and be a pilot. At 17, he wants to do something else.

We heard from the official guardian. We heard of the opportunities for representation given to children. The one loophole seemed to be at the county court level where a certain device, apparently, was used, which was adjournment for suggestions that the official guardian be brought in, but that seems to me--we heard from the official guardian that not only were they acting as guardians ad litem, but they were also in some instances, particularly with the older children, acting as counsel. I feel to give a child as defined in the act--while it might be a desirable thing in principle, in practice I don't think it is desirable at all. I think the opportunities that currently exist for representation are adequate under the circumstances.

Mr. Renwick: Mr. Chairman, I have trouble with dividing the category of a child who is a minor into two classes without creating some problems by differentiating arbitrarily between persons who are or are not 10 years or do or do not have the ability to instruct counsel. I am trying to get at the matter in a somewhat different way and I think I would still prefer to follow

that method. That was the proposed new section I tabled as a amendment yesterday about the question of representation, which appropriately would come up in the area of the question--I forget which section, 64 or thereabouts--when we come to it. I propose to move that the court may at any time give such directions for the representation of the child as the court considers proper.

I was going to try to get at least an overt statement in the bill on that whole question of representation rather than leave it to the Judicature Act or the County Courts Act or elsewhere. That language may not be perfect but I'd like to choose to deal with it that way. I must say with great respect I have difficulty about that dichotomy about who is or who is not able to instruct counsel and then indicating that, whichever side of that fence you fell on, you would have counsel. With great respect, I don't think I can support the amendment although I appreciate the point Mr. Spensieri is trying to get at.

Mr. Chairman: Any other comments on the amendment? Those in favour of Mr. Spensieri's amendment, please raise their hands. Those opposed.

Motion negatived.

Mr. Chairman: We will go on with Mr. Renwick's amendment of section 18(1) adding a definition of "Canadian extraprovincial tribunal."

Mr. Renwick: The reason for the amendment is simply that I want in subsection 1 of section 42--and there is an amendment I will propose at that time--to provide for the automatic recognition by an Ontario court of an order of a Canadian extraprovincial tribunal and to distinguish a Canadian extraprovincial from other extraprovincial tribunals, and to distinguish the consequences of that. I think the point is clear. If it is not clear to the committee, rather than ask that it be stood down, I would say that is the context in which it is going to be discussed that is important. I am in your hands about it, whether you want to table this amendment, rather than stand it down until we come to section 42, on the understanding that if I am persuasive on my amendment to section 42(1), maybe you would agree to reopen this section after we had passed it because it would be a consequential amendment.

3:30 p.m.

Mr. Chairman: How does it appear to the ministry? What would you like to do? Move it to 42 reserving it?

Mr. G. W. Taylor: You are going to have to open up the section. If that is the wish of the committee, it is better that it be left to that point in time so the discussion can be related.

Mr. Renwick: I would feel better if we started closing these sections and then if we have to reopen, we can reopen.

Mr. Chairman: Is it understood that this amendment of Mr. Renwick's then is put down to section 42, but with the proviso or condition that 18(1) may be reopened?

Mr. Renwick: With the consent of the committee.

Mr. Chairman: They would be giving their consent at this point; it would be the consent at this point.

Mr. MacQuarrie: Assuming the latter amendment carries.

Mr. Chairman: Yes.

Mr. Renwick: Do you want me to move the amendment now so that it is before us?

Mr. Chairman: Yes. You should read it into the record, please.

Mr. Renwick moves that subsection 1 of section 18 be amended by adding thereto the following definition:

"(d) 'Canadian extra-provincial tribunal' means a court or tribunal outside Ontario but elsewhere in Canada that has jurisdiction to grant to a person custody of or access to a child."

Mr. Renwick: Mr. Chairman, it is the fourth one in the package that I collated this morning on section 18(1), the definition of separation agreement.

Mr. Chairman: And the ministry has an amendment which I put before yours.

Mr. Renwick: That is fine.

Mr. Chairman: Mr. MacQuarrie, you have an amendment to section 18(1), the addition of a section, section 18(1)(d), which is a definition for separation agreement.

Mr. MacQuarrie moves that subsection 18(1) of the act, as set out in section 1 of the bill, be amended by adding thereto the following clause:

"(d) 'separation agreement' means an agreement that is a valid separation agreement under part IV of the Family Law Reform Act."

Mr. Chairman: Mr. Renwick, perhaps we will have you first because you had comments or a further amendment to that same topic.

Mr. Renwick: The one I was proposing is a somewhat simpler statement and does not have a cross-reference. I would have proposed that a separation agreement means an agreement in writing signed by the parents providing for custody of, the incidents of custody of, access to and the incidents of access to the child, but I bow to those in authority to tell me that Mr. MacQuarrie's amendment accomplishes the same purpose. I would certainly be interested as well in Mr. Preston's comments about that.

Mr. Chairman: Mr. Taylor first and then Mr. Preston.

Mr. G. W. Taylor: The amendment was composed out of the conversations we had yesterday with respect to the numerous amendments and cross-references there would be in other statutes in the family law area that pertain to children and parents and custody. Although this particular section does not meet with all lawyers' approval, and you might have to have more than one volume of the Ontario Reports on your desk at one time to review the matter, it is designed to have a defined agreement that is consistent in law.

I think the discussion yesterday dwelt upon the words "separation agreement," which may have more than one meaning or can have a more restrictive or a larger meaning. This gives the opportunity so that the area of family law will have one definition of separation agreement. By referring to the Family Law Reform Act, when it is in play, and by using this definition, it brings in all the features of the Family Law Reform Act in regard to a separation agreement and the formalities of executing a separation agreement so that we have now for the area of family law a consistent definition of separation agreement which we feel at this time would be adequate to serve the purposes of the amended bill. Even visiting upon us your definition, Mr. Renwick, it would then tighten up that so that we do not have, in considering your definition, two definitions in the same course of litigation, but one feature defining separation agreement. That is the reasoning for putting forth the amendment at the request that it was not precisely defined in the act as presently before us.

Mr. Preston: Thank you, Mr. Chairman. I was pleased to see that Mr. MacQuarrie's amendment did not just refer to the separation as defined in the Family Law Reform Act because it is not specifically defined. To understand the effect of what a separation agreement is, part IV of the Family Law Reform Act, in section 51, says, "'Separation agreement' means an agreement entered into under section 53."

Then when you turn to section 53 it says, "A man and woman who cohabited and are living separate and apart may enter into an agreement in which they agree on their respective rights and obligations, including--" and they include subsections (a) through (e), one of which is custody of and access to their children.

Then you have to go to section 54, which says in its first subparagraph, "A domestic contract and any agreement to amend and rescind the domestic contract are void unless made in writing and signed by the persons to be bound and witnessed." What that amounts to is the essential elements for the actual validity of the separation agreement.

It is somewhat convoluted to arrive at what is valid as to being a domestic agreement. Then you have to look at what is a separation agreement vis-à-vis a domestic agreement because other agreements, such as marriage contracts, domestic cohabitation agreements, et cetera, are also domestic contracts.

What worries me about Mr. MacQuarrie's amendment is that it has the words "a valid separation agreement" in it, and that invites questioning the validity off the bat. Whether or not I have

all the statutes on my desk or not, and I always have them there anyway, if you are in court on a matter you like to have the statute you are dealing with and you like to have the terms of reference in that statute so it can stand alone.

The reason for our original submission is that we feel that in any legislation a bill, as far as possible, should stand alone and it should not have to be correlated if you can avoid it. If you have to go to determine what is a valid separation agreement under the Family Law Reform Act, there are other things under the Family Law Reform Act that might affect the validity. For instance, it is improper to bargain in a separation agreement out of the rights to possession of a matrimonial home under the Family Law Reform Act. That may affect the validity somehow of that agreement. It does not have anything to do with custody or access.

Mr. G. W. Taylor: That is severable.

Mr. Preston: That's a severable term but it depends on how the agreement is worded.

3:40 p.m.

Mr. Tucker: The definition also refers only to part IV of the act.

Mr. Preston: Which definition?

Mr. Tucker: Mr. McQuarrie's.

Mr. Preston: Mr. McQuarrie's recommendation, yes. That is a valid separation of agreement under part IV. Then what you are really saying is that a separation agreement may be valid for this bill, but it may not be valid under the Family Law Reform Act.

Mr. Tucker: No. What we are saying is the same thing that you said yesterday --and you can correct me--that it is a package of three sections: successional reform, family law reform and children's law reform.

Mr. Preston: Right.

Mr. Tucker: The second thing, as you said, is that you cannot have a simple definition, but you must bring in all the mechanics under the Family Law Reform Act.

Mr. Preston: Right. I do not disagree with that.

Mr. Tucker: So it should satisfy what you asked for. It applies exactly the things you mentioned under sections 52 and 53 of the Family Law Reform Act.

Mr. Preston: As well as 54. Can you answer me this then: Can you envisage an agreement that is valid under part IV of the Family Law Reform Act in so far as the Children's Law Reform Act is concerned but may not be valid under the Family Law Reform Act itself because of the other provisions in that bill?

Mr. Tucker: It does not say that. It says valid under part IV.

Mr. Preston: I understand that.

Mr. Tucker: Part IV sets out the requirements in the sections you refer to.

Mr. Preston: I suppose all I can say is that I would prefer, and I would think the bar would prefer, simplicity over cross-references. In so far as Mr. Renwick's amendment says an agreement in writing, if you added the words "as were in the Family Law Reform Act and witnessed" and you provided that it was between parties that are separated, because that is the nature of the separation agreement, then his definition would be simpler than the referral back and looking at 53 and 54.

I suppose if they get the same place, and I think that looking at them they do get the same place, there is not a distinction except that in one place you have the actual definition, and they are the same thing, I suppose, aren't they.

Mr. Chairman: Thank you. Are there any other comments with regard to Mr. McQuarrie's amendment?

Mr. Renwick: Whether one is more cumbersome or one isn't simpler was not quite my problem, although sometimes you do have to be cumbersome about these things. I tried to address the substance of what I saw to be the situation here, which is that the act will suspend the right to custody and the incidents of custody of one of the parents until such time as there is an agreement or an order defining it. That is what has happened. That is what the bill says, as I read the bill.

Therefore, I thought that, whatever else a separation agreement would have to deal with, the minimum is that which two parties could agree to. They may not have agreed with everything else. They may not have done all of the other things, but they should have met certain formal requirements to put down in writing an agreement between the two of them with respect to entitlement to custody and the incidents of custody--and I added access and incidents of access to. In other words, if they dealt with that field in an agreement which the two parents have signed--and I agree with this point that signatures should be witnessed--it should be the easiest possible way for the suspension of the important rights of the one parent to be raised. In other words, do away with the statutory suspension as easily as possible. That is why I went this way.

I am not knowledgeable about all of the other things that are required by a separation agreement under Mr. McQuarrie's definition. I was just going to that fundamental question that here, by statute, we are suspending the entitlement to custody and the incidents of custody of one of the parents. There should be an easy road back to re-establishing whatever the decision of the two parents may be.

I thought that it was an agreement that should be in writing and signed by the parents. I agree the signature should be witnessed, and that would necessitate an amendment to my draft, and that it should provide for the custody and the incidents of custody of the child. I have added access to and the incidents of access to as well. If it met those requirements, that would raise the suspension automatically.

I am very pleased that fundamentally at least, whether or not we totally agree on the definition, it is a recognition by the ministry that the term "separation agreement" had to be defined. I think that is a big step forward.

Mr. Chairman: Are there any other comments with regard to Mr. McQuarrie's amendment? All those in favour of Mr. McQuarrie's amendment please raise their hands? All those opposed? The motion carries four to two.

Amendment agreed to.

Mr. Renwick: Mr. Chairman, I do not propose to put my amendment because of the passage of the previous amendment.

Mr. Chairman: Thank you. Are there any other comments with regard to section 18(1)?

Section 18, as amended, agreed to.

On section 19:

Mr. Chairman: Mr. Renwick moves that section 19(a) be amended by inserting after the words "access to" the words "incidents of access to."

Mr. Renwick: The reason for my amendment is that submissions made to us suggested there should be a similar reference to what comprises access so that when we deal with section 20(5), which defines a portion of what access means, we can have an understanding that that is not an exclusive definition, but simply includes certain rights.

I had thought for a while that I would have to come up with some other language other than "incidents of access", simply copying the same wording with "incidents of custody." But I was delighted to read in this act that the terms "incidents of access" is hallowed in section 21. It says "The court to which an application is made under section 21...(b) by order may determine any aspect of the incidents of the right to custody or access."

3:50 p.m.

I took it that any aspect of the incidents of the right to access is in the bill in that wording. Therefore I thought it was most helpful for us to indicate that this term "access" requires some thought and definition in each individual case to elaborate the incidents which attach to it. As you know, I will have a further amendment to give some effect to that when we come to section 20(5). I think it is a very reasonable amendment. I cannot conceive that it would be deleted.

Mr. G. W. Taylor: I will again refer to Mr. Shipley on it. However, as was expressed initially, there are certain features of custody, now more fully defined as "incidents of custody," but they are not the same; although one might conclude that if you are modifying custody and its incidents, one might say we should have modification of qualities of access. However, access has conditions, not incidents.

We may be just running into semantics here, Mr. Renwick and colleagues, but I would not rest heavily on section 28, as you have done, saying that we had intended incidents of right to custody or access, because we have already discussed it with counsel. That drafting might be improved upon because it does lead one to conclude that the conversation goes right through and they are modifying each one and it allows you to come back to the earlier section saying it does.

Mr. Renwick: If I may interrupt, sir, you are going relatively the same way. I had thought I would have to come up with a different term and came up with the term "attributes of" to distinguish whatever that fine distinction might be. But I took great solace from the fact that the careful draftsmanship of the bill had included incidents of access in it. Rather than think that there was some error in drafting, I felt that it was very perceptive in its draftsmanship of section 28(b).

Mr. G. W. Taylor: I am not as thorough, Mr. Renwick, as these gentlemen are, or as Mr. Shipley is, on the philosophy that is taking place in the field of family law today, in that there appears to be developing this term "incidents of custody" but not so in the definition of "incidents of access."

To that, I can only say that the authoritative authors and leading professors on the subject all refer to the incidents of custody. Mr. Renwick, one might in your time before the court may have even called those conditions of custody, as you might say, conditions of access. However, there appears to be developing the feature, incidents of custody.

Mr. Shipley and the advisers of the ministry lean toward the approach of the law that is at present developing in the field of incidents of custody but not in incidents of access. Thus, we may be trying to create a new area that is not already in the field of family law as it is developing. I might ask Mr. Shipley to explain that more fully, as he has studied more texts on the particular subject.

Mr. Shipley: Thank you, Mr. Taylor. I am trying to start at the beginning, at what custody means. I think there is a consensus, and I think Mr. Taylor and the Canadian Law Association people mentioned it the other day, that custody does consist of a bundle of rights. It is made up of a number of different rights and some duties; the right to care and control, the right to direct, things we talk about in (b) and maybe a few other things; the right to discipline the child, the right to consent to marriage, the right to consent to medical treatment. That is what custody is; it is a bundle of rights.

We can't find anywhere a similar bundle of rights that access is. The courts seem to say, and the learned authors and textbook writers seem to say, that access doesn't have that same bundle of rights. I referred this morning to the law reform commission report I received from Saskatchewan today. It says: "Access is merely a right to visit the child, which does not confer upon the noncustodial parent any right to care and control except to the extent necessary to protect him while he is with the noncustodian."

Their own bar admission course referred to that same kind of thing. The parent exercising access is not entitled to alter or change the child's mode of life. He only has the degree of control necessary to ensure the wellbeing of the child while he has him with him. If we were more convinced that there incidents of access, we might be a little more willing to embody that kind of concept in legislation.

The other very important point to mention at this time is that the reason we spoke specifically about the incidents of custody in this legislation is that we envisaged cases in which the parents were still living together and had an ongoing relationship. The family was working fine, except the parents had only one dispute, what school the child should go to, or what religion the child should be raised in.

There was a dispute about one of the incidents of custody, not about who should have the child all the time, or that the other parent should be deprived of the custody of the child. They had a dispute about only one aspect of their mutual equal entitlement to custody. In that case we felt it was important to provide an opportunity for them to go to court and have the court determine that one dispute without having to apply for an all-or-nothing situation, one where you are applying for custody and the other then would be only entitled to access. By setting out the incidents of custody, by using that concept and that terminology, it provides the parents, in an ongoing family, the means to settle one aspect of the dispute.

Mr. Renwick: Mr. Chairman, may I respond to that? I agree entirely with the conceptual way in which Mr. Shipley has expressed it. I had been looking around for a different way of dealing with the concept of access to indicate that it wasn't just a sterile word, that it had to be given some content. Therefore I had first wanted to use the term "attributes." It was only because of section 28(b) that I felt it was at least implicit in the bill that there be things called "incidents of access." I would like, therefore, with the consent of the committee, to change my amendment to what I had thought was necessary because of the explanation of Mr. Shipley.

Mr. Chairman: Mr. Renwick moves that section 19(a) be amended by inserting after the words, "access to" the words "attributes of access to."

Mr. Renwick: I make this simple change in order to make the conceptual difference. I again refer to section 20(5), which we will be coming to. It gives a specific attribute to the right, whatever else it may be, where it states: "The entitlement to

access to a child includes the right to make reasonable inquiries and to be given information as to health, education and welfare of the child." So we have one attribute being included by statute for the word "access." I thought the substance of the submission that was made to us would be met by those terms. With the consent of the committee, I would like the motion, when voted on, to have the change I have referred to.

4 p.m.

Mr. Preston: I must disagree somewhat with what Mr. Shipley has said. First, one member of our committee was Professor James G. McLeod from the University of Western Ontario. He is a professor of family law. He is also the editor of Reports of Family Law which go across Canada and summarize and deal with, to the best of their ability, the most up-to-date family law cases. Professor McLeod was in favour of this amendment relating to incidents of access, incidents of custody or incidents of access.

The word "incidents" is terminology. I think it has sprung up. The definition of "custody" is only under common law. What custody is under common law does contain what has been interpreted over the years as bundles of rights. Every time there is a dispute, there is a new right or something that is quantified. What has happened when parents are in dispute and one has custody and one has access, they have generally gone along and said, "If you have custody, you have the paramount decision-making ability," and with every new problem there is an additional decision-making ability added to the custody. That is where the term "incidents" as I understand it has come in.

But if you have the term "incidents of custody," do you then have the ability in this act of saying, "Here is an incident of custody, call it education, that is going to be given to the parent who is given access"? In other words, does the court say: "The wife has custody. The access parent, being the husband, has access plus the incidents of custody, education," or do you say, "One of his incidents of access is the right to determine the education of the child"?

I think the second approach would be the best approach. I think if you are going to have a concept that there are elements of custody or bundles or whatever that are severable in some way, shape or form--and the courts are making these orders today. They are making orders that say, "You do have custody, madam, but your husband has the right to determine the religion." Surely, then, the court should say, "One of the incidents of access in that case is the right to determine the education or religion of the child."

Mr. G. W. Taylor: I do not want to stop you but that is not access. That is referred to in the custody part. Surely, you cannot say access is also religious access.

Mr. Preston: No, his right of access--

Mr. G. W. Taylor: That is one of the features of custody.

Mr. Preston: Well then, do you say that the access parent has custody so far as the religion is concerned?

Mr. G. W. Taylor: No.

Mr. Preston: What do you call it?

Mr. G. W. Taylor: I have not drawn enough orders lately. I cannot disagree with you, but I am sure in the order it would state the religion of whatever party it is going to be is inserted in the order. That is a custody order. You would not get an access being to instruct the child in a particular religion.

Mr. Preston: I suppose that is a condition of custody then, is it?

Mr. G. W. Taylor: That is an incident or a condition of custody.

Mr. Preston: Then you have the conditions of access as well. Call them conditions or call them incidents, it means what are the limitations or expansions on the access rights. The access rights might be limited as to time, as to weekends, as to place, as to supervision. I do not care if you call them "conditions" or "incidents." That is what the court can order. It is semantics to say it is a difference between conditions or incidents. They are all particular rights that party has by virtue of that order.

Therefore, I do not understand that this is creating any new body of rights or laws. It is just saying to the judges, "When you are dealing with access, you have a possibility of making limitations or expansions to access or limitations or expansions to custody," and I cannot understand how you can have one term without having the other.

Mr. MacQuarrie: When you boil it all down, though, is not access really an incident of the custody order.

Mr. Preston: No, most definitely not. If you have two parents and you want to tell one he is just something less than the other parent, that he is just an incident of that party's custody rights, the thrust of the whole thing is--

Mr. MacQuarrie: The right of access to the child, the right to have this--

Mr. Preston: It is a corollary right to custody. If one has custody, the other in common law has the right to access. It is a corollary rather than an incident. There is a body of law that says you have access rights in common law. And it should be--one of the biggest problems you have in a family law dispute relating to custody is that the parent does not want to give up the input.

He may recognize that, because he works all day and the wife is at home, she is better able to put up the day-to-day care, but he says, "I don't want to give up my input into raising the child." If you can recognize that access is less than a second-class situation by saying, "Yes, the court can order some assistance, some input," then you are going to move in a direction of having fewer custody disputes per se.

Custody now under common law has all of these other things attached to it and, if you are merely ordered access, then you are really second class in so far as your child is concerned because you have no rights of input unless the court specifies them. What we are really doing is inviting the court to take that into consideration.

Mr. G. W. Taylor: We still have difficulty with these words and the features. I go the way Mr. MacQuarrie was leading. You have, as I mentioned, a custody order. In there it sets out the incidents of custody or the conditions, terms, features, whatever words you want to use for this bundle of rights as custody. There is also coming up in this legislation to take care of some of those features--I will use the generic or general term--"joint custody," so that we know both parents have some features of custody.

Mr. Preston: You have very carefully avoided saying "joint custody" and I agree rightfully so.

Mr. G. W. Taylor: I recognize that but there are situations. So those are still then in your order incidents of custody whereas the access, as the law is developing, really does not have those incidents. It has access to be with that child.

Mr. Preston: It has conditions. What is the difference?

Mr. G. W. Taylor: If you are going to say "access," either it has some conditions or global conditions. Usually, in most custody orders it says "access" and it defines a date, a time, a place and maybe supervision, maybe just reasonable, whatever the term.

There is this field of access there which really has conditions or qualifications but that is so as compared to the developing law now and the incidents of custody which are becoming greater or in the word of qualifications of incidents of custody. A while back it was just "custody or the conditions of custody" although now, as I mentioned, there seems to be this body of law developing using the word "incidents."

Mr. Preston: Because the court has not said the magic word "incident" so far as access is concerned, that does not mean that it has not worded it in a different way. What is section 20(5) if it is not creating an incident of access? The right to the information, is that not an incident of access? Are you not creating it yourself in the bill?

Mr. G. W. Taylor: You play with words too. On these, one might have said had they inserted in the purposes section, 'incidents of custody,' 'entitlement to access,' and to 'guardianship' and continued on, then you have in the next section, subsection 5, the entitlement to access."

That is my view on drafting compared to the drafters here and compared to yours and compared to somebody else. The entitlement to access has been expanded upon so that those might be knowledgeable, when you come to subsection 5 of section 20, say, "Access also includes this, so don't you people forget to provide that

information to somebody who has access." That is expanding on some of the features of access as compared to time, date, place, supervision. We have gone that far.

Mr. Preston: If I may make one last comment, bearing in mind this bill is, so far as custody and access is concerned, quite radical. The most you have had now is the Infants Act or the Family Law Reform Act that go nowhere so far as defining and governing the court as to what they can order for custody and access. There has never been anything approaching the best-interest test other than the common law.

The tendency of the court, as we view it, as has happened in the Family Law Reform Act, is to say: "Forget the common law. You now have a statute. You must deal with the statute." Will the courts therefore be hesitant to do what they are already doing now and breaking off part of the custodial rights and the common law, and giving them to the access parent because of the way this act is dealt with? I do not know.

4:10 p.m.

Mr. Renwick: I am only saying this from my own point of view, not from the point of view as a person, as my friend is, who is practising in the field all of the time. Conceptually, I can make a distinction between the two words "custody" and "access" where the words "incidents of custody" are not necessarily the appropriate way to describe incidents of access. I think about it in these terms, that custody is in a sense a container which has certain incidents which you can analyse.

Access means something moving, access to the ability to reach, an opening to, and the court has to define the terms and conditions of that access under which it shall be done. As Mr. Preston has obviously pointed out, whether it existed in common law or was in the process of development as part of the common law, we are in section 20(5) adding access to information as part of the attributes, as I want to use the term, of access.

I would have no difficulty with incidents of access in the long run. As I say, it is easier for me to think of the two matters separately. However, I do not suggest for one moment that access is some tag-on aspect of custody. What we are doing is breaking--when the court is required, the common law would be required to break a joint custody arrangement. By awarding custody to one, they automatically created another right. One can argue that right, of course, was inherent in the custody part of it.

In a sense you have chopped out part of the joint custodial arrangement and given an aspect of it such as access a special status, but this bill very clearly indicates that it is not a tag-on, it is a right and it has an equal status because the words "entitlement to access" and "entitlement to custody" say you have to have a content for those two terms. The access part, in my words, seems to be easier if I think of it in terms of what are the conditions of access rather than what are the incidents of access, but I do not think it matters in the long run.

I do think it is incumbent upon us to indicate that access is a concept which we are leaving to the court to give content to. We must not in this bill indicate that it has some shrivelled nature to it where the court is inhibited in any way. There may be very special situations of every conceivable kind that can come up where the terms and conditions of access are going to have to be defined, refined and given meaning to make it fit what we are all talking about, that is, the best interests of the child. I think that would be extremely important.

For example, it might be quite consistent to say that, if a child had a musical talent which the father also had, the extent and degree of the access would be a lot greater if it was designed to meet the need of the child to develop that particular talent than he be with the parent in situations where normally it would not apply.

My only concern would be to make certain that we negate the traditional view that somehow or other access has this minor negative, shrivelled content at all, that it can never expand to the full extent of custody. Of course it can because custody is inherent in it and under section 20(2) we will have the major ingredients of that relationship with the child there, but I think we have to do something with section 19, whatever the words are.

Our purpose is to allow the courts full ambit to develop the access appropriate to the interests of a child. I think one step has been taken in section 20(5). I am hopeful that perhaps if we can agree to the language of section 19, we can make a change with respect to section 20(5). That was the intention of a further amendment I was going to give. Whatever the words, whether "incidents of," "attributes of," "terms and conditions with respect to," whatever the terms, let us put something in to indicate that the court has a capacity to give content to the meaning of that particular word.

Mr. Chairman: Are there comments regarding Mr. Renwick's amendment to section 19?

All those in favour of Mr. Renwick's amendment will please raise their hands. All those opposed, please raise their hands.

Motion negatived.

Mr. Chairman: You can't win them all. Since we have a minor victory here, shall we deal with section 19(a) to (d) in the draft bill? Are there any other comments with regard to section 19(a) to (d) inclusive?

Section 19(a) to (d) agreed to.

Mr. Spensieri: Mr. Chairman, I would like to introduce this amendment, notwithstanding the ill-fated older child provision. With the committee's permission, I would like to delete "older child" and still introduce the amendment.

Mr. Chairman: Mr. Spensieri moves that section 19 be amended by adding the following paragraph:

"(e) To confer certain substantive and procedural rights under this part upon a child as hereinbefore defined."

Mr. Spensieri: The reason for wishing to add this amendment is that it seems to me that if we are dealing with a section that is essentially a preamble section or a section that sets out the stated objectives or purposes of the act, some reference ought to be made for the guidance of the court to what the legislator's intent is with respect to what I have called the substantive and procedural rights.

Since we have shied away from making the child a party, we have shied away from making the older child a party and we have shied away from wishing to give the right to counsel, it seems to me the very least we can do for the guidance of the court is to say that on the balance of probabilities they ought always to rule in favour of having the child present. One way we can make this happen is by adding in the preamble section this very clear objective. For that reason, as innocuous as this amendment may be and while it may appear to be purely pious and wishful thinking, I think it would be beneficial if it were to be in there so courts could look at it and act accordingly.

Mr. Chairman: Any comments on Mr. Spensieri's amendment?

4:20 p.m.

Mr. MacQuarrie: I thought Mr. Spensieri put it very well, Mr. Chairman. To a large extent it is pious and wishful thinking. I just want to know where in the bill we have procedural rights conferred upon the child. We have certain ones upon married children, but they seem to be the ones who have the right to take action in their own names and on their own behalf. I am not exactly sure what is meant by substantive rights, but certainly the whole direction of the statute is to protect children and to make sure their best interests are attended to in certain respects. I just don't know what this adds to the main purposes of this part of the statute as already outlined in the section. Could the ministry comment on that?

Mr. G. W. Taylor: The ministry was commenting on other matters. It is felt, with the purpose of the section as it presently is and the different features of the entire act, it does provide certain benefits for the child that are substantive. The procedures are there and they are substantive. As Mr. Spensieri said about his motion, even though excluding "an older child," it is innocuous and superfluous, and the ministry is of the same conclusion. We think the bill adequately performs without the amendment as put forward by Mr. Spensieri.

Mr. Renwick: Mr. Chairman, much as I like the amendment, I don't think it is consistent with the reality we are faced with. We are faced with the proposition that even if we would like to have the child as party to the proceedings and thus provide some

substantive and procedural rights for the child, the ministry has clearly indicated that is totally unacceptable to it at this time. Much as I would like to think that concept through and to propose it, I have decided we will not propose that.

What we will try to do is to make a minor advance on the question of the representation of the child, so minor in fact that the ministry could not possibly not accept it, but perhaps in due reflection of time it would have a content to it that would allow us perhaps at a later date to move into a clearer definition of the rights. So I would rather sacrifice the intent of Mr. Spensieri's amendment because of its propitiatory nature and try to win the other battle about representation for the child later on in the bill.

Mr. Chairman: Are there any other comments with regard to Mr. Spensieri's amendment? Those in favour of Mr. Spensieri's amendment please raise their hands. All those opposed please raise their hands.

Motion negatived.

Mr. Mitchell: I see there are some four or five proposed amendments to section 20 that will have to be discussed and they all appear to be interlinked, so I think perhaps this would be a good time to adjourn.

Mr. Chairman: Yes.

Are there any more comments with regard to section 19?

Section 19 agreed to.

Mr. Chairman: Shall we adjourn to reconvene? Yes, Mr. Renwick.

Mr. Renwick: What are your intentions now?

Mr. Chairman: The chair has no intentions. What are the intentions of the committee with regard to this bill?

Mr. Renwick: I am quite literally surprised. I thought we would have been either substantially through the bill or would have completed it today. I am wondering what your intentions are tomorrow with respect to the out-of-town members of the committee, and then your intentions after that. Because if it is our intention to adjourn at noon or 12:30 tomorrow, I think we are going to have one hell of a time going through the rest of the bill, and I would like to get through it.

Mr. Chairman: We have no authority to reconvene and to carry this longer than tomorrow night at 4:30. The House gave us authority to meet last week and this week to deal with two bills, 125 and 6, and the authority of this committee then expires.

Mr. Eaton: (inaudible) except when they extend that.

Mr. Chairman: Oh, yes, certainly. Our authority to sit expires unless someone does not recognize the clock or the day of the calendar.

Mr. Mitchell: Or the three party leaders agree that--

Mr. Chairman: Yes, which would be very unlikely since the House is not in session. If you note the wording of Mr. Wells' motion to the House, it gave special continuance from the last session to this session.

Mr. Renwick: It did not spell out the days we were to sit. The order of the House didn't.

Mr. Chairman: Yes.

Mr. Renwick: Did the order of the House spell out the days we were to sit?

Mr. Chairman: I believe so.

Mr. Renwick: No. It did not.

Interjections.

Mr. Renwick: (inaudible) agreement of the House leaders.

Mr. Chairman: I did check it earlier.

Mr. Laughren: May I make a suggestion that the committee meet tomorrow morning, and in the interim, the chairman, first thing in the morning even, contact the House leaders, who will be easier to get hold of then, I suspect--there are all sorts of reasons from the leaders--and see if there are any objections. I find it very hard to believe the House gave specific dates for sitting. I believe the dates were determined by the House leaders in agreement, and they have always said the committees determine their own schedules.

Mr. Renwick: I happen to have the motion here: "That the following standing committees be continued and authorized to sit during the interval between the first and second sessions of the thirty-second parliament, with authority to consider business as follows: standing committee on the administration of justice, to consider Bill 6...and Bill 125...and that Bill 6 and Bill 125 remain committed during the interval and, upon commencement of the second session, be deemed to have been introduced," et cetera.

Therefore, I think the times were simply by agreement with the House leaders. But my problem is I do not want to expand the time. I would like to get the work done.

Mr. Mitchell: Speaking for myself, Mr. Renwick, as an out-of-town member, we had the leeway given to us on Monday sittings, so I am quite prepared to sit tomorrow if we feel we are able to finish it.

Mr. Laughren: I am only one member, but I have great difficulty sitting beyond noon tomorrow.

Mr. Mitchell: You are in a difficult position of catching a flight.

Mr. Eaton: There is no sense in coming in for a half day and not even finishing it then.

Mr. MacQuarrie: Would it be possible to sit until noon tomorrow, then Monday afternoon? Or do you have all day tied up?

Mr. Chairman: There may be members who have scheduled their weeks rather than their afternoons or days and who may have a lot more difficulty next week than they do with tomorrow afternoon.

Interjections.

Mr. Laughren: Why don't we decide that tomorrow morning?

Mr. Chairman: What do you wish the chair to do so far as the House leaders are concerned?

Mr. Laughren: Leave them out of it.

Mr. Mitchell: I think if Mr. Renwick has read the motion correctly, it says the interval between sittings, and as a result it is within the control of this committee to decide.

Mr. Eaton: How much time have we got in committee? If we can't finish it in a half day, can we finish it in one whole day?

Mr. Chairman: That is entirely up to the committee. You can finish it in five minutes if you are--

Mr. Eaton: No. I am talking about a reasonable basis.

Mr. Mitchell: If someone is prepared to put a further motion through or something, that is fine.

4:30 p.m.

Mr. Renwick: May I suggest, Mr. Chairman, at least for consideration, since most of us are in town in any event, that we start at 9:30 tomorrow, that we go until one o'clock--

Interjection.

Mr. Renwick: Oh, sorry--12:30?

Mr. Hennessy: Twelve o'clock.

Mr. Renwick: All right.

Mr. Chairman: Do we have any problem with that?

Mr. Renwick: That is 9:30 till 12:00 and regardless of where we are--we will do our very best--we will adjourn then to come back at the call of the chair for one further day whenever he can spot it.

Clerk of the Committee: Is anyone on a committee next week? That is the one thing. I have not got the schedules here.

Mr. Gordon: I am scheduled for a committee.

Mr. Hennessy: Tuesday.

Clerk of the Committee: You are on another committee next Tuesday.

Mr. Hennessy: Tuesday. I'm sitting Tuesday.

Clerk of the Committee: I see. My own committee does not (inaudible)--

Mr. Renwick: What about next Monday?

Mr. Eaton: There is only one committee sitting next week and that is public accounts.

Mr. Chairman: We can come back Wednesday and Thursday--

Mr. Eaton: So next week is not a bad week if we could get it in.

Clerk of the Committee: No. Is that all right--sometime next week?

Mr. Chairman: Is Monday all right?

Mr. G. W. Taylor: I would just like to drop a bombshell on you people. I do not know where the Attorney General is next week. I know where I am committed for come Monday, and it is not here.

Mr. Renwick: You will be actually away on Monday?

Mr. G. W. Taylor: Indeed I will be.

Mr. Hennessy: Jim, take his place (inaudible). Why not?

Mr. G. W. Taylor: The program was set up, as you are probably aware, with knowledge of these dates, knowledge that one chairman would be away, ministers and committee members, and staff for those committees. So it was all tied in together when the dates were set.

Mr. Laughren: We will find that out by tomorrow morning.

Mr. G. W. Taylor: Although they are not firm, that is the procedure of the planning.

Mr. Mitchell: On the basis of Mr. Renwick's suggestion, I am quite prepared to begin here at 9:30 tomorrow. I think the balance of how the committee deals with this solely rests with your trying to resolve whether the PA is available or who is available to continue with it. What are the conflicts for next week? I don't think we are really, at this point, in a position to say. I don't have my schedule in front of me. I left my calendar back at the office to have it brought up to date. On Monday and Tuesday I know I am fine, but that may not be the case other days.

Mr. Chairman: It is a consensus we will meet--

Mr. Piché: Mr. Chairman, I understand we are going to meet from 9:30 till 12 tomorrow.

Mr. Chairman: Yes.

Mr. Piché: When we resume, if we are not finished, can we come back when the Legislature resumes and finish our work at that time? Why do we have to finish next week or the week after?

Mr. Mitchell: It says during the interval in the motion.

Mr. Piché: Yes, but we still could come back maybe a day before the Legislature and finish. Why go through all this effort and the problem it creates when we can come back a day or two before the Legislature resumes and finish it to be in time to present it to the House?

Mr. Hennessy: We have plenty of time.

Mr. Piché: We should be almost finished by 12 o'clock tomorrow, I would think.

Mr. Chairman: Let us do what we can. I will attend the House leader's office directly when I leave here. Let us reconvene at 9:30 tomorrow morning and let us move with dispatch till 12 o'clock in such a way that all the discussion becomes academic.

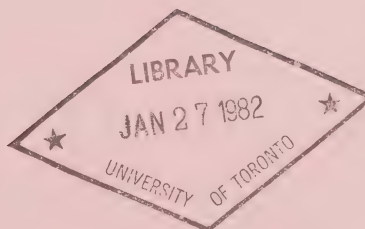
The committee adjourned at 4:33 p.m.

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STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHILDREN'S LAW REFORM AMENDMENT ACT

FRIDAY, JANUARY 15, 1982



STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

CHAIRMAN: Treleaven, R. L. (Oxford PC)
Andrewes, P. W. (Lincoln PC)
Breithaupt, J. R. (Kitchener L)
Eaton, R. G. (Middlesex PC)
Elston, M. J. (Huron-Bruce L)
Gordon, J. K. (Sudbury PC)
Laughren, F. (Nickel Belt NDP)
MacQuarrie, R. W. (Carleton East PC)
Mitchell, R. C. (Carleton PC)
Piché, R. L. (Cochrane North PC)
Renwick, J. A. (Riverdale NDP)
Spensieri, M (Yorkview L)

Substitutions:

Cunningham, E. G. (Wentworth North L) for Mr. Breithaupt
Hennessy, M. (Fort William PC) for Mr. Andrewes
Kolyn, A. (Lakeshore PC) for Mr. Eaton

Clerk pro tem: Nokes, F.

From the Ministry of the Attorney General:

Beecroft, D. A., Counsel, Policy Development Division
Shiple, A. Q., Counsel, Policy Development Division
Taylor, G. W., Parliamentary Assistant
Tucker, A. S., Legislative Counsel

Witnesses:

Lackovic, D., Member, Abducted Children's Rights of Canada

From the Canadian Bar Association (Ontario Branch):

Kiteley, F., Member, Family Law Section

STANDING COMMITTEE ON ADMINISTRATION OF JUSTICE

Friday, January 15, 1982

The committee met at 9:44 a.m. in committee room No. 1.

CHILDREN'S LAW REFORM AMENDMENT ACT
(continued)

Resuming the adjourned consideration of Bill 125, An Act to amend the Children's Law Reform Act.

Mr. Chairman: We have a quorum. We have Miss Kiteley with us from the Canadian Bar Association, who is helping out Mr. Preston and Mr. Davis, who were here through the earlier proceedings, and Mrs. Lackovic is with us this morning.

Yesterday we carried section 19 and stopped on section 20, custody and access, in which there are four amendments.

Mr. Renwick: Your voice is booming this morning.

Mr. Chairman: Is that right? Probably I start off with lots of enthusiasm and it gradually gets less as the day goes by.

On section 20:

Mr. MacQuarrie: If I recall correctly, there were no amendments relating to section 20(1).

Mr. Chairman: Shall subsection 1 carry? Carried. Mr. MacQuarrie wants small victories.

Mr. MacQuarrie: An inch at a time is something. We start with small steps.

Mr. Chairman: On subsection 2, I believe Mr. Renwick's amendment is first.

Mr. Renwick: Mr. Spensieri has an amendment as well which is to the same affect as mine. I defer to Mr. Spensieri.

Mr. Spensieri: I am really gratified that Mr. Renwick would defer.

Mr. Chairman: Mr. Spensieri moves that section 20(2) be deleted and the following substituted therefor:

"A person entitled to custody of a child has the rights and responsibilities of a parent in respect of the person of the child, which rights and responsibilities must be exercised in the best interests of the child and include:

"(a) the care and control of the child;

"(b) the education, moral training, religious training and cultural upbringing of the child."

Mr. Spensieri: Essentially, the reason for rewording this section is twofold. First, we felt that the general statement that the custody must be exercised in the best interests of the child, as drafted, was made in the form of an appendage or afterthought, and we felt it ought to be a prevailing and overriding theme in the body of the section.

The second reason for introducing the amendment is that we felt the matter of cultural upbringing of the child should be specifically flagged out for the consideration of the court as one of the items requiring consideration in matters of custody. I am thinking specifically of the interests of native people, as was mentioned by the family law group of the Canadian Bar Association.

More important, and more to the point in a metropolitan context, is the question of inter-ethnic or mixed marriages where one parent may wish to provide that the cultural upbringing of the child include language education in the language which is normally spoken in the home, orientation in the particular culture and milieu of that child, and knowledge of the history, traditions and backgrounds of the country of origin.

For that reason, it would appear that the courts ought to address themselves specifically to the question of the culture of that child, and in what cultural background he is likely to operate in adult life, so that in certain instances preference might be given to a custodial parent who has definite and well-defined plans for the child, in terms of preservation of cultural background.

While I realize that the courts look at the various aspects of custody--the various bundles of rights that we talked about--it seems to me that if we flag out education, and if we flag out moral training, and if we give special emphasis to religious training, we have to, as a necessary corollary, give some highlighting to cultural upbringing.

Those are the reasons for my amendment, and I would hope that members would support the intent, if the not the specific language, which some may have a better wording for.

Mr. Mitchell: Might I ask the drafters or the ministry people why the theme of cultural training, or whatever you want to call it, was not included in the bill in itself? I can only go by what I read in the newspapers, but seeing the situations that have developed over cases of adoption and so on, particularly in recent years, it strikes me that if we are dealing with children and their upbringing, whether it be an adoption or strictly custodian or guardianship, whatever we are calling it, that should be a theme that is in here.

Mr. Chairman: Thank you, Mr. Mitchell. There appear to be three amendments engrossed in one--three slightly different topics. The first is the addition of the words "which rights and responsibilities in the best interests of the child," et cetera. The next one is putting commas in "moral training," repeating the

word "training" with commas. The third issue is the addition of "cultural upbringing."

9:50 a.m.

Mr. Spensieri: I thank you for pointing it out, Mr. Chairman. The present section seems to indicate that religious training and moral training may be synonymous. We simply wanted to point out that the moral training is one aspect, and while moral training may enter into religious training, I think it deserves a separate comma.

Mr. Chairman: Taking those three separately, could the parliamentary assistant indicate which of the three, if any, we can isolate first and that you might find acceptable? I am attempting to isolate the issues, or the least controversial, so that we can then discuss the most controversial issues. That is what they taught us in law school; isolate the issues first. That gets you 50 per cent of the marks, as I remember.

Mr. G. W. Taylor: Mr. Chairman, when you look at section 20(2) in its entirety, it is a basic philosophy that when you are looking towards custody you are making those decisions with the best interests of the child. As we have gone through from day to day here, it is only natural that each one of us wants to put the wording in a different form and a different variety. The principle is there. Section 20(2)(b), the features of education, moral and religious training have been, in the decided cases, those items that historically have been decided upon, that we will look at those when we are asking judges to make decisions in regard to custody. Education is a very broad category and I would submit would include all those items that Mr. Spensieri has mentioned.

We would consider the education part of it to include all of those items of culture, language and other features of education in the broad category, because the list is not intended to be an exclusive list and one can continue on with many additions as we meet society's requirements and what lawyers may say, "Could you put that in there so we know that the judge can draw his attention to that?"

However, the drafters felt, moving ahead to section 24(2)(e), that when you are determining the best interests of the child "the court shall consider all the circumstances"--and then you go down--"any plans proposed for the care and upbringing of the child," and that again was considered in a global aspect to get any other items that might not be set out in particularity in section 20(2)(b) where you have those three main items, education, moral and religious training inserted.

That is the background on that and why at this point there is a reluctance to insert any further items other than those three major headings of "education," "moral" and "religious" training, not to have anything to do with the restriction of the use of culture. It is felt that culture is part of that education and could be picked up in the later general section as well, where plans are submitted.

It was the intention of the drafters that "moral" and "religious" should be separate; "moral" is not included in "religious." As you mentioned, Mr. Chairman, that is the one we could allow for some correction on if the legislative drafter so thinks. It's a matter of interpretation at some later time, but it is the intention that those are two separate items to look at, "moral" and "religious," and they are not grouped.

I might add that Mr. Shipley may want to comment on the history of this section and how it was developed.

Mr. Shipley: With respect to the question of whether moral and religious training are deemed to be separate aspects of the rights of custody, I would point out that this was a question that was much discussed before the standing committee last time. It was accepted that moral and religious training were different aspects, and this was the draft that resulted to reflect that. The draft was clearly prepared to reflect the request of the last committee that "moral" and "religious" be different.

Mr. Elston: I wonder in the same vein, then, if you have sort of carried on from the suggestions of the last committee, if you would care to return to some of the suggestions of the former committee on other sections. You have sort of switched grounds and you have taken up what you think, I suppose, is of help in this particular section. I don't know that we should accept part of what the committee decided beforehand as gospel and then incorporate it in a new piece of legislation, because you have changed the drift of some of the sections here when you compare it to the (inaudible) that came out of committee.

I want to say again, and I guess I've said it a couple of times, that I think if we want to express our intention further then let's do it clearly, and I think Mr. Spensieri's amendment tells us very clearly that moral training and religious training are separate items.

I also want to say that we seem to fly all over the place when we come to meet arguments about specificity. At one point or another we want to be specific by tagging moral and religious training, but we don't want to put in culture because you think it's included in education. If we're really thinking seriously that education is that broad an item then I think we might very well just put down "is responsible for the education of the child" or "education and upbringing" and leave it very, very general in those terms. But by putting in moral and religious I think you restrict the technical meaning of education to something that would indicate formal education in the sense of the three Rs, if you wish, or whatever is picked up now in the education system.

I really do think that, when we are addressing the judge's attention and the solicitor's attention to the fact that any plans they may propose for the care and upbringing of a child before a court ought to include some dealing with the question of moral and religious training, we should also deal with the much broader and, I think, equally important question of the cultural rearing of the child, because that is a very important aspect and I think we ought

to earmark it for some specific study by the people who use this statute.

Again, I think Mr. Spensieri's amendment is very worthy of consideration and very worthy of passage and introduction into this piece of legislation. I just think it's much clearer. I have read the existing section 20(2). To be quite honest, it reads sort of roughly, and I think that moving "in the best interests of the child" into the preamble before paragraphs (a) and (b) makes it very clear what is to be expected of the individual. Now, it may be a matter of taste for drafting, but I think the section reads much better, and I do think we ought to include the cultural upbringing of the child as a specific area for concern along with those other three areas and then let section 24(2) and the paragraphs throughout deal with more general matters so they can fill in the details after that.

10 a.m.

Miss Kiteley: I was just noting that Mr. Spensieri's amendment leaves out a couple of words, and I wonder whether it was intended that way. The section as it reads now says "the right to direct the education," and you have simply left in "rights and responsibilities include." "Direction" is a fairly significant word because it means that they have a controlling (inaudible). I wonder whether it has been watered down somewhat by leaving out the words "to direct" and whether that was intended.

Mr. Spensieri: The omission was simply intended to make the entire subsection much more harmonious in its flow. I had no desire to water down the concept of directing education, and if I did I regret its consequences. I understood the term "education," as Mr. Elston does, as being formal education such as would be imparted in our schools. And of course, as parents, unless you are going to be engaged in private tutoring or private schooling or some kind of schooling outside our public or separate school system I don't really think most custodial parents have any real directing ability over the curriculum to which their children are exposed, except when they exercise their vote every four years or whatever. But it seems to me that those words were really quite meaningless unless you get into special education programs or self-paid education programs such as exist.

Miss Kiteley: But does not "direct" apply to each of those words: education, moral, religious and cultural? So it doesn't apply just to education? If it applied only to education I could see that, but the direction of one's cultural training is what you are after, is it not?

Mr. Spensieri: Yes. I agree with you that it could possibly be interpreted as watering down the rights of the custodial parent, but that certainly was not the intent.

Mr. G. W. Taylor: Mr. Spensieri, does the difficulty arise--and this has been suggested for some of the philosophical background reasoning for not putting an all-inclusive list in (b) and leaving them in what I have described as their general headings of education, moral and religious training, those larger groupings

and cultural and some of these other items. Maybe it's physical education; maybe it's physical activity; it might be musical training. There could be many items under education.

It's considered by draftsmen and some of the jurists and people in this area that when you start flagging all those items specifically it then creates an opportunity to contest each and every one of those flagged items, and they become a contentious issue--sometimes a major contentious issue--in a piece of litigation, particularly in this type of control and custody; whereas by allowing it to be under the section in 24 where somebody poses a plan that the court can look at and assess without its becoming a major issue--and the more you specify them the more those can become major issues.

I recognize that in some cultures, I am sure, that may be the major argument or contentious issue, but it's felt that if you flag it the court then feels it must pay heed to it because they have suggested it's a major item to look at--"they" being the legislators--and, therefore, you get a full-scale, elaborate, long, bitter or contested argument about that particular item.

The reason it hasn't been in and approached this time is that it hadn't been considered previously, and these were the three major headings, other than when Mr. Preston raised it the other day as being a thought that might be included. It wasn't included previously because it wasn't considered, and secondly, education has been the broad general category and these have been the major categories in the previous groupings of contested actions, and those are felt to be the major ones of discussion in a child custody.

Mr. Spensieri: If I could respond very briefly, Mr. Chairman, the problem I see is that you have basically two approaches. First, you can adopt what Mr. Elston has pointed out as a generic approach. You simply say that a parent has to be responsible for, you could say, the education, the welfare, the upbringing. You could use a generic approach and leave custodial parents and courts to devise specific aspects of that approach.

The minute you begin to give examples of what a custodial parent must address himself to by starting to introduce education in its restricted sense, moral training in its restrictive sense and religious training, then you automatically, in my experience, trigger in the court an intention on the part of the Legislature to have the court look at those specific areas. By doing so you give those specific areas some kind of pre-eminence in the mind of the court. And it seems to me that if you are going to give pre-eminence to religious training, then, without belabouring this point of cultural upbringing, you must also give pre-eminence to cultural upbringing.

In my experience in practice and from talking to other colleagues, you often get situations where, say, you have a parent--a father, for the sake of argument--who has been raised in or still operates in a cultural context, and a mother who may be of a different culture or Canadian born or of another origin altogether. If there's a marriage breakup the court may attempt to

balance the rights of those two parents, and if they are balanced it will then look at what this custodial parent proposes in terms of the cultural heritage of this child. It may swing the decision of the judge in favour of a parent who has more definite and more consistent plans for the cultural continuity of that child.

That is why I see it as very critical, because it's becoming more and more of a problem, especially in the communities in which I operate, where there is a marriage breakup and the custodial parent chooses to take a child entirely away from a cultural context in which he has been operating up to the point of the marriage breakup.

It seems to me that by adding this slight amendment, by having cultural upbringing made a specific head of consideration, you re-establish some balance in favour of cultural continuity and preservation of that heritage in that child, especially, as I said, in the communities in which I have personal knowledge. That's why I'm very insistent--and I don't wish to belabour this point--but I think it ought to be made a specific heading.

Mr. Chairman: Thank you, Mr. Spensieri. Did you wish to add anything to what Miss Kiteley said about the words having been deleted? Did you want those added back in?

Mr. Spensieri: I don't think it hurts my amendment. If we go back and include "the right to care" and "the right to direct" it does not in any way negate the amendment. So I think we can go either way; I don't see any particular magic in the words "the right to care" or "the right to direct." I think they're words that certainly would be well understood within the context of my preamble. I don't think they add or detract, and I'm content either way.

Mr. MacQuarrie: Mr. Chairman, I must say that I find some difficulty with this section in view of the fact that it contains the specific examples of rights and responsibilities. And the rights and responsibilities of the parent in respect of the person of the child are so broad and have been so well stated both in common law and in the jurisprudence that has developed under the various statutes that I really don't--

What we are trying to emphasize in this section is that a person who has custody has the rights and responsibilities of a parent which shall be exercised in the best interests of the child, period. Why do we get into this situation of trying to isolate individual aspects of parental rights and responsibilities? It just tends to confuse an already confusing piece of legislation.

10:10 a.m.

Mr. Elston: Mr. Chairman, I had mentioned the same sort of things as Mr. MacQuarrie and I find some merit in those. If you are going to flag some and you still think there are other items which are important, then you are almost admitting that those ought to be flagged as well. If we decide we will not because it might become contentious, that is really no reason for making that decision.

I think I would be content in following Mr. MacQuarrie's suggestion, and that is to leave the section as it is after "child" in the fourth line and stop right there. Say, "the rights and responsibilities must be exercised in the best interests of the child," then leave it for each specific case to determine which issues are more important to the people who are sitting when they deal with the section 24 components.

I just believe if we are going to eliminate cultural upbringing--which I think is an extremely important thing, as important as any of the others that are listed there--we are doing a disservice because it means people's minds will perhaps not be turned to it in as critical a role as it ought to be.

If I can get back to the suggestions of Miss Kiteley and Mr. Spensieri's follow-up of that, I would think one of the reasons we have reworded the section to deal with which rights and responsibilities must be exercised and include, is to deal with the problem that the custodial parent had the right to the care and control, had the right to the education, et cetera, and we wanted to make sure it was well understood that the right also included the responsibility. It may be a minor sort of point, but if we were going to do that, I would suggest that paragraph (b) be worded to read, "The direction of the education, moral training" and things like that. That would still have the mandatory sort of situation of the requirement for them to deal with decisions on education and moral training.

Those are my comments and I would be quite content if Mr. MacQuarrie wanted to move an amendment or whatever.

Mr. G. W. Taylor: Mr. MacQuarrie has left the room. At the present moment, Mr. Elston, I am informed that the wording of another feature of why (a) and (b) are in there, and primarily (b), setting out education, moral and religious training, is that as you are aware, this came from the Infants Act and then the Minors Act. The topics of education and morals were in the Infants Act, which then became the Minors Act, so those have been flagged by previous Legislatures to look at. That is why the continuation.

There was another section in the same two acts I have just referred to that gave one parent the religious training aspect and that was then grouped from the same and we have put them all in here in the one section. But, as Mr. MacQuarrie has stated, and you have reaffirmed, the main feature of the section is the rights and responsibilities of a parent in the best interests of the child. So that is the main essence of it. As Mr. Spensieri has mentioned, these others are set out to draw the attention of the courts to the fact that those are the main topics.

We have not considered expanding on the topics, as I mentioned earlier, because of the later sections where we think that can be taken care of by the judge in a particular proposal that is put before him for that particular child. I recognize that in some cases there may be a very definite situation where there could be a cultural dispute as to which parent is going to direct

that feature, but I would submit that also is fully under the heading of education as we have known it.

Mr. Elston: If you want to put it in the generic sense let us leave it generic.

Mr. G. W. Taylor: But you see, I was going to continue on that there are some aspects of culture and surely our history bears out and parliaments bear out, how do we define culture and what aspects of culture are the ones that are going to be listed? This is a very difficult task and has been for our legislators historically as compared to religious. Religious is a generally known label. These are certain religions to follow.

A judge could say you may bring that child up in a specific religion, be it Roman Catholic, be it Buddhism, Presbyterianism, what have you, whereas the cultural aspect is such a large bundle, so you come more into education. In making the pitch to the judge you could ask to have the child educated or trained in a particular language, as compared to the cultural part.

Mr. Elston: Culture, though, does not just reflect on language solely.

Mr. G. W. Taylor: I recognize that, Mr. Elston. I took language as a broad category.

Mr. Elston: I took languages at school and I am sure I would not be considered a member of the communities whose language I studied. There are just so many more aspects to culture than singularly looking at language or singularly looking at music, for instance.

On one level we are saying that education is so general that it includes everything. On the other we are saying that we want to tag it because it is more specific and then we have to sort of weigh the meaning of moral training against cultural upbringing I suppose, and we are saying we cannot be specific with culture because it is such a broad bundle of components, but moral obviously does not have such a broad bundle of components. I really do not know whether we are clearing the water or not. I suspect we are not.

I think what we really ought to do is ask the straightforward question, are you willing to consider these amendments at all? If you just say no, I think we ought to just stop the discussion because I think we are only going to muddy the waters more for anybody who might want to follow the transcripts of this deliberation to see what in the dickens we were talking about. I think maybe we are to that point now. I do not want to pre-empt anyone else who wants to speak, but I think we ought to consider that we ought to be moving along. We are just going across the same paths time and again.

Mr. Renwick: Mr. Chairman, I would like to speak briefly to this. I would wholeheartedly support Mr. Spensieri's amendment. It is an improvement on the amendment which I would have proposed had he not proposed it. I accept the amendment as he has indicated

with the change suggested by Miss Kiteley that we insert the words, "the direction of the education," et cetera in item (b). I want to speak to the amendment in that sense. There are three or four matters that are a problem in the bill as drafted.

First of all, Mr. MacQuarrie's argument is quite flawed. No one denies that the common law has developed over a period of time the various facets of the rights and duties of parents, but in the generic sense that would probably help if we had it in some place. But what we are talking about here is splitting custody so that what is a two-way relationship between the parents and the child now becomes a three-way relationship, and in this particular clause what we are trying to distinguish is when the custody is split, when the custody is separated from the joint custody and granted to one, then I do think you have to specify the extent to which, in general terms, the one who does not have custody is excluded.

Therefore, I believe there is no particular merit in the very generalized statement that Mr. MacQuarrie put forward, let alone the more philosophical one that the very problem with children has been that the common law, with the best will in the world, has never been able to escape the ambit of treating children as property. What we are trying to do is to accomplish that.

10:20 a.m.

Secondly, the subsection in the bill is flawed for the reason that was stated when we had the discussion on Wednesday, and I need not prolong it, that it refers in items (a) and (b) only to the right and not to the responsibility. It is offensive to me to have a bill relating to the Children's Law Reform Act have no reference when we are specifying the major categories to deny the question of the responsibility. Again, I do not want to go into the philosophical meaning of what the right means, but with respect to the child, items (a) and (b) should carry the connotation of the responsibility as well as the right. Otherwise we should delete the word "responsibilities" in subsection 2 entirely and not kid anybody about it.

The third point is, no matter how the parliamentary assistant wants to fuzz it, grammatically speaking, item (b) has two categories and two categories only in the English language. One is "the education" and the other one is "the moral and religious training," and moral and religious are conjunctive in the way in which the bill is drafted. If it were not conjunctive, you would not have two "ands" in there. There are two categories, not three, in the classification which the minister has in front of him.

As to the content of the classifications, whether you take the two the ministry is putting forward, or whether you take the four Mr. Spensieri is putting forward, one could discuss forever the content of them and no one of them lends itself to some characterization that it is more specific than any other. One could argue from now until kingdom come as to what is the discharge of the responsibility of a parent with respect to the direction of the education of the child. One could argue from now till kingdom come about the direction of the moral and religious training of the child.

Similarly, I believe Mr. Spensieri would agree with me, if you divide it as Mr. Spensieri has into four major categories, that is, education, moral training, religious training and cultural upbringing, then you could conduct a philosophical discussion for ever on each one of those categories. I have no problem with the generalized categories, or that one is less or more specific than the other, or that one includes the other, or it includes some part of the other.

I am impressed with the need for a reference to the cultural upbringing because this government, and my riding and this province regardless of the government, is generally committed to a multicultural society, and the cultural upbringing of the child, while portions of it may be included in education, does not include the whole of the cultural upbringing of a child.

Therefore, for those reasons, I would urge the ministry, not as a matter of semantics, or not as a matter of a technical amendment of some kind, to accept wholeheartedly the suggestions included in the very proper and appropriate amendment of Mr. Spensieri. If the ministry is not prepared to assume it, I assume that when the bill is in committee of the whole House we will have a further discussion on this matter.

But it is absolutely essential that if the ministry wants to progress with this bill it has to understand that the work which has been done by members of this committee with respect to the bill are not criticisms of the ministry; they are full of appreciation of the 90 per cent of the work which has been done with the skill of the staff of the ministry, but we have spotted serious problems with the bill. I can assure you I will speak to the Attorney General (Mr. McMurtry) myself to see that the parliamentary assistant's career in the government is not affected in any way if he agrees to some amendments.

Mr. Hennessy: That ought to kill him.

Mr. Renwick: I will assure Mr. Shipley and his colleague, who have been working on this bill, that if they want to have some rapid promotion in the Ministry of the Attorney General, an element of independence is essential and a sense with it. As I say, both Mr. Laughren and myself would be glad to take the Attorney General out into the alleyway if any untoward consequences fall on any of them.

We have to get back to some sense in these committees that, with nonpartisan bills, we are trying to improve the bills. We are not engaged in a controversy with the ministry. This is, in anybody's language, a significant improvement on what is in the bill. It may well be that, with the various amendments which are in front of us, we can move this bill quickly out of this committee because we can get a fine bill. But if you persist in thinking that all of the wisdom of the world is distilled in this bill, we are not going to make it.

I said yesterday I could not understand why we were not finished with the bill. We are obviously not going to get along

very far this morning. We are not going to be able to put the bill off, as I thought for a moment Mr. Piché was suggesting was a very good one, if substantial parts of the bill are not reached. I reiterate my view to the parliamentary assistant; let us not get into a confrontation over this or dig our heels in. Let us work together to improve the bill.

There are no votes in Riverdale for the work on this bill. There are no political kudos to be won by anybody so let us pretend we are working together to get the best legislation we can. Please, parliamentary assistant, support the principles of Mr. Spensieri's amendment. If there are refinements of language, we can leave that to the legislative counsel and to the counsel for the ministry.

Mr. Mitchell: It was the motion itself. There is only one area that I have really a concern about and that is, as I stated before, the cultural part of it. The parliamentary assistant tells us that is covered in section 24(4), was it, or 24(2)? I cannot remember precisely. How much difficulty would it cause if we were just to amend and put in the addition of the word "cultural," putting aside the balance of Mr. Spensieri's motion? I personally cannot see it causing a problem other than it is really identifying that there are cultural situations which exist.

Mr. G. W. Taylor: Mr. Mitchell, I will have Mr. Beecroft point some of the difficulties with that.

Mr. Beecroft: Mr. Mitchell, my concern with emphasizing cultural upbringing is that, as Mr. MacQuarrie indicated earlier, these specified rights are the traditional rights. Generally speaking, the parent who has custody has the right to direct the education. In other words, where there are disputes between the parent with custody over education and the parent who does not have custody, the right belongs to the parent with custody.

To add in culture there, you have the possibility that you have two parents from different cultures. You would be giving to one parent the right to direct the cultural upbringing of the child. It seems to me you are inviting that parent to say to the other parent: "I have the right to direct the cultural upbringing of the child. I do not want your culture influencing the child." It seems to me we should be respecting all cultures. We should be encouraging both parents to give the child the benefit of their cultural heritage.

10:30 a.m.

Mr. Elston: And the religious heritage and their moral upbringing and their formal educational requirements. It cuts both ways on--

Mr. Beecroft: That may be true but, traditionally if a parent was given custody, that meant that parent's views with respect to religious training were predominant.

Mr. Mitchell: I have some difficulty with the comments of Mr. Beecroft. You mentioned religious and you include religious.

but you have many situations where the parents are of mixed religion.

Mr. Beecroft: The law up to now has been that the parent with custody--

Mr. Mitchell: But the law has to make that decision at the time that the guardianship and what not, or whatever you want to call it, is awarded.

Mr. Beecroft: That's right.

Mr. Mitchell: The court has to make that decision. How much more difficult are we making it for the court to say that at the same time they decide the cultural aspects of this situation?

In my opinion, I suppose, our courts are today having to develop more of the wisdom of Solomon. My concern is that we are seeing more of this in the newspapers as time progresses. It still comes down to the end result; somebody, and it is usually a judge, has to decide if the child will be brought up in the Catholic faith, which happens to be the father's faith, the child will go to a separate school because that is the father's faith, and so on.

How much more difficult are we making it? If the judge has to decide that, how much more difficult are we making it for him to say culture?

Mr. Beecroft: I appreciate your point. Let me give you one scenario. You have one parent of Greek origin. You have another parent of Ukrainian origin. After considering all the circumstances, the judge decides the child will go with the parent of Greek origin and gives access to the other parent. The Ukrainian parent wants to take the child to Ukrainian activities. The parent with custody will then say: "I have custody. I have the right to direct the cultural upbringing of the child. I want my child to be raised as a Greek. Do not take him to Ukrainian activities."

Mr. Mitchell: But, with respect, is that not what the judge is doing today?

Mr. Beecroft: No, because cultural upbringing is not one of the traditional rights of the custodial parent.

Mr. Mitchell: By name, no. But where you have an interracial mix or an interreligious mix, when the judge awards custody or guardianship or whatever to a person, he is really doing that at this time. At least, my understanding is that the judge is currently recognizing this. So why do we not recognize it?

I do not wish to appear to be hindering the bill. The parliamentary assistant and yourselves have said that is allowed for in the more general terminology or sections of the bill. If it is covered in the more general sections of the bill, I am saying to you--in other words, can you tell me what harm it would do to put it in there? You are giving me arguments, but would you not agree that the judge in the long term is making that decision in any

event, whether you want to apply the legal-cultural to it or whatever?

Mr. Elston: Mr. Chairman, I wonder if I could officially move an amendment to the section as addressed by Mr. Spensieri.

Mr. Chairman: Are you moving an amendment to his amendment?

Mr. Elston: Yes.

Mr. Chairman: Mr. Elston moves that, under subsection 2(b), the words "the direction of" be included before the words "the education."

Mr. Elston: That would take into consideration Miss Kiteley's concerns and direct us to the attention of that. I would further ask that we now proceed to vote on it because we really have gone on at length and I think we have reached an impasse of sorts in terms of convincing anyone further.

Mr. MacQuarrie: In view of the fact there seems to be a desire on the part of some members of the committee particularly to have the word "cultural"--whatever its meaning might be--included in clause (b) of subsection 2, could this not be inserted? I cannot see it doing any particular harm to a section that is already in my mind--

Mr. G. W. Taylor: Mr. MacQuarrie, while the discussion has been ongoing, I have been discussing with my advisers to the ministry and listening to the quality of the argument from all sides and all individuals. Even though the amendment that is on the floor before the committee at present rearranges the section a little more than might be adequate to do the task, I would consider a motion from you, Mr. MacQuarrie, if you would so make the motion, and that the present individuals could then withdraw their motions. It adds in the two items that have been mentioned.

One, by Mr. Renwick, which is just the added word where he finds it, and that was a draftsmanship one that was prepared to be changed, the moral and religious so that it becomes more emphatic that they are separate, that it is moral training and religious training, so that there will not be any confusion. In that same section--if you would so move and I will give you the wording so that you may do that--under clause (b) add in "cultural upbringing" and I--

Mr. MacQuarrie: I have then a draft resolution, Mr. Chairman.

Mr. Chairman: We have a bit of a procedural problem here. We do have in front of us Mr. Elston's amendment to Mr. Spensieri's amendment to the draft bill. Before I can entertain a brand new amendment, it would have to be an amendment to the amendment to the amendment, unless these gentlemen withdraw their amendments first.

Mr. Renwick: I think you have jumped the gun a little bit. I was just beginning to get an understanding of what was being

said, and I do not think that we can ask that the motion be withdrawn or that it be treated as an amendment until we are clear about what is going to be proposed.

Mr. Chairman: Before Mr. MacQuarrie moves his motion, might he advise us what is in his motion?

Mr. Mitchell: Read it into the record, Mr. Chairman?

Mr. Chairman: Yes, without moving it.

Mr. MacQuarrie: If I could outline the proposed change to section 1, it is that section 20(2)(b) of the act as set out in section 1 of the bill be struck out and the following substituted therefore: "The right to direct the education, the cultural upbringing, the moral training and the religious training of the child in the best interests of the child."

Mr. Renwick: That would be totally acceptable to me if Mr. MacQuarrie would see fit to add the words after the word "right" in item (a) and (b) the words "and responsibility" so that item (a), for example, would read "the right and responsibility to care and control of the child." Mr. MacQuarrie's amendment with that addition would be entirely satisfactory to me.

10:40 a.m.

Mr. Chairman: While Mr. MacQuarrie is deciding whether he would agree to add the word "responsibilities," Mr. Spensieri has a comment he wishes to make.

Mr. Spensieri: Mr. Chairman, I think the proposal being made by Mr. MacQuarrie answers most of our concerns. It leaves the lingering issue of the fact that both the rights and the responsibilities must be exercised. It also leaves in some doubt the paramountcy of the concept of the best interests of the child. I think it would be better if that paramount consideration were to be stated in the body of the section, rather than coming right at the end of the two subsections. That is just a matter of emphasis and perhaps of drafting. On the whole I would be content to have Mr. MacQuarrie's amendment, implemented with the change with respect to responsibilities.

Mr. Mitchell: Do I understand Mr. Spensieri has withdrawn?

Mr. MacQuarrie: No, he has not said that.

Mr. Chairman: With consultation, if you wish, Mr. MacQuarrie--do you wish to add the word "responsibilities" in your motion?

Mr. MacQuarrie: I can see no particular value to its being added, but neither can I see anything particularly harmful in it.

Mr. Renwick: I think the only value is that it is up above. It refers to rights and responsibilities and I think if we are delineating--

Mr. MacQuarrie: They say they have the rights and responsibilities of the parent, and I think when you outline the rights the care goes with the (inaudible) and the responsibilities certainly would go with the right.

Mr. Chairman: What are you saying, Mr. MacQuarrie--that you do or do not wish to add that?

Mr. MacQuarrie: I say it is immaterial to me, Mr. Chairman.

Mr. Renwick: Mr. MacQuarrie, let's have it in.

Mr. MacQuarrie: I will defer to comments from the ministry in this respect.

Mr. G. W. Taylor: I was persuaded by your initial comments, Mr. MacQuarrie, on the amendments in your motion. I have some difficulty, on advice of staff, with adding "responsibilities" in that section as you propose amending it. I am willing to hear further discussion on it.

In the section as you have proposed it, and as it was originally, the right to "direct the education," one may say that it is implicit there that if you have the right to direct, you have the responsibility to direct. There would be others who would say that is not in there--you might have the right to direct but that does not also put on you the responsibility. The first part of the paragraph is that the responsibility as a parent is there; you have the rights and the responsibilities of a parent in the general context and all of its ramifications.

I can only take the advice of the legislative drafters for the ministry, that "responsibilities" possibly puts in a heavier onus. I might ask them to comment on whether that would be too heavy an amendment to that section and would cause greater problems.

Mr. MacQuarrie: As I said, to me it is immaterial, but I am prepared to be guided by the ministry.

Mr. Shipley: The question I have is whether or not adding responsibility in clause (b) would create a positive obligation on parents to provide religious training for their children.

Mr. Mitchell: I am very pleased with Mr. MacQuarrie's proposed amendment and I thank the ministry for seeing the arguments we put. I also see that the first paragraph says, "The rights and responsibilities of a parent." Then under (a) you say, "The right to the care and control of the child." "Right" is strictly, in my opinion, a right; it does not put an onus. To me, responsibility puts an onus. Surely we are dealing here with a bill designed for the protection of children. To say someone has the right, fine; but there is nothing there that says, "You must."

Similarly, in (b), if we are concerned about education--which by law we have to be concerned about because under the Education Act a child must be in school--let's face it, there are parents

whose kids, the way society is today, can charm them out of almost anything. The fact that the right is there does not mean the parents have to say to them, "You will have your education, you will go to school." So the right is a privilege they have to do certain things. The responsibility, to me, is the onus part of it. That is all I wish to say on that.

Mr. Chairman: Mr. Spensieri, I just want to clarify for the chair's sake that the words "which rights and responsibilities must be exercised in the best interests of the child" are not included in Mr. MacQuarrie's proposed motion. Is that correct?

Mr. MacQuarrie: That's right.

Mr. Chairman: That is left out.

Mr. MacQuarrie: As far as (b) of that section is concerned, the amendment is simply that "the best interests of the child" remain as the concluding words of the subsection. The draft resolution that I would propose to put would not include the words "and responsibility."

Mr. Chairman: It does not include that.

Mr. Mitchell: I have a final question. Mr. MacQuarrie said earlier that he sees no problem being created whether or not the word is added. That is one lawyer's opinion, but we have other lawyers' opinions and I must enunciate this once again. A great number of us have certain rights, but the fact that we have those rights does not put any onus on us, at least in my reading of it. Is it not the intent of the ministry, by this bill, to put an onus on people?

Surely the whole rationale behind bringing out amendments must have been brought about because as things were, they were not satisfactory. I may be dealing with semantics and maybe the words really do not mean anything, but to me they do. I just happen to see that it is one thing to have a right, but along with that right, when we are dealing with children there has to be, "You will," shall I say.

10:50 a.m.

Mr. MacQuarrie: This is the situation, Mr. Chairman. To my mind what we are trying to create in this legislation is that a person entitled to custody of a child has the rights, and exercises the responsibilities, of a wise and fair parent. To mandate in that respect is, I think, fair and reasonable, but to cast specific onuses on a parent, which in my opinion are implicit in being a parent-- Does "responsibility for religious upbringing" mean going to church every Sunday, or can the parent sleep in the odd Sunday and not take the child to Sunday school?

Mr. Elston: What does the wise parent do now?

Mr. MacQuarrie: You get the wife to trot them up off Sunday school and you stay in bed.

Mr. Mitchell: May I ask a question of Mr. MacQuarrie? You have been in active practice in the field of law, and I am sure that in your practice you have noticed what appears to be an increase in vandalism, and a variety of activities that when you and I grew up were perhaps not accepted or allowed. Would you not feel that the increase in some of these things is due to the fact that the parents are shirking the responsibilities that the parents are expected to have?

Mr. MacQuarrie: I would agree that to an extent that is the case.

Mr. G. W. Taylor: Mr. Mitchell and Mr. MacQuarrie have come to certain conclusions about what would happen if you were to insert the word "responsibility." The gist of the legislation is to set the duties, responsibilities--the rights, one might say--between two parents or contesting individuals for the custody of the child.

When they have gone before the court and the court has adjudicated on it, it then states--as Mr. Mitchell has said--that you have rights, one of which concerns education. But the formal features of education are governed by other pieces of legislation. They cover the compulsory aspects of education and put this obligation upon the parent. It does not come from the court order or from the contest between the parents.

Mr. Mitchell: There is the Truancy Act, or whatever act is comes under, yes.

Mr. G. W. Taylor: There is the Education Act and the Child Welfare Act. There is, then, the right to direct, and there is a responsibility to educate the child because there is other legislation requiring that.

Mr. Renwick: There is no right to an education in Ontario. There is only a right to a place in a school. It is very clear as a matter of law. It is a right to accommodation. That is what we were fighting about for ages, to get that right to an education. The special education bill did that. The Conservative government, and the Liberal government before them, liked to kid people there was an obligation on the state to educate, but there isn't. The only thing you can get is a place to sit.

Mr. G. W. Taylor: You must have the right to an education and you must have the responsibility to put your child in a school for a period of time until he reaches a chronological age, if those words would better suit you.

Mr. Renwick: That has nothing to do with education. That's just a place for parents to plant their children so they can do other things during the day.

Mr. Mitchell: Mr. Chairman, we've spent a long time discussing this particular area. I think we should proceed with the votes.

Mr. G. W. Taylor: But when you put in the responsibility

part of it there isn't a responsibility, and if you so put it in the court order-- The religious: is it one that I'll have the right to direct it, and now you must have the responsibility, as Mr. MacQuarrie said? There is a question on that, whether the court now must direct you to make sure that child attends that church. There is a question on that, whether that is--

Mr. Mitchell: Ah, that is not the philosophy of the act, to enforce the religious--

Okay. I'm sorry to prolong it, Mr. Chairman.

Mr. Renwick: Would you allow me to interject? I agree entirely, Mr. Taylor, with the way you're approaching it. I don't mean by that that I like it, but I agree with what you're saying.

The point is right that if you treat it as deciding between two parents which one is going to have the right to do it, then that right can be challenged if the responsibility is not carried out, because at any time a parent who has not got custody can go to the court and get the court to make the decision with respect to it. If you leave it entirely as a matter of right without emphasizing the responsibility, then there is no way in which you can get the matter clearly before the court about whether or not the person who has been awarded the custody is discharging the responsibility that is a correlative to the right.

I felt that Mr. Mitchell has been right on in this discussion with you about this. The view I have is that we are not trying to add to the world; all we're saying is that between two people, if one is given the right and simply treats it as a privilege, whether he or she does or does not do it, then it seems to me that you exclude the other person from raising the issue of the failure of the person who has custody to carry out the responsibilities that go with it. It's in that sense that I think the word "responsibility" is an essential correlative to the word "right." And, of course, it has been generally agreed, anyway, because the opening clause of the bill has those words.

Mr. MacQuarrie: Supplementary to Mr. Renwick's remarks, Mr. Chairman, I think he's overlooking the last seven words of that particular subsection. Those words, "in the best interests of the child," certainly affect the rights that the section purports to attach. I think that certainly attaches responsibility to the parent to what the court considers, and the other parent can certainly say: "The way it's being handled is not in the best interests of the child" and bring it before the court.

Mr. Spensieri: Mr. Chairman, in indicating to the chair my intention to withdraw my amendment and also my colleague Mr. Elston's intention to withdraw his amendment to my amendment, I just wish to say that we've sat on this bill for about a week, and I'm still not very clear in my own mind whether this is a bill about the rights of parents or a bill about the rights of children. It seems to me that if we are serious about saying that it's a bill about the rights of children, then the concept of the responsibility of the parent who is given custodial rights must be in there somewhere in a very pre-eminent form.

It goes back to the amendment I made in the preamble in section 18, which was treated very cavalierly and very lightly. But I think somewhere in there we ought to have the concept that this bill confers rights upon a child. We are now not only shying away from that but also saying that a custodial parent has no responsibilities. I wonder where we are going with all this subtracting from and diminishing what seem to be indispensable provisions in this bill.

11 a.m.

But as I said, I will withdraw my amendment. Mr. Elston intends to withdraw his amendment to my amendment. I reserve the right to introduce an amendment after Mr. MacQuarrie indicating that we wish the word "responsibility" to be introduced.

Mr. MacQuarrie: The section says he has responsibilities.

Mr. Spensieri: Not in here. You need it right in there.

Mr. Chairman: We are at the point of voting on this. Have you so withdrawn?

Mr. Spensieri: Yes.

Mr. Chairman: It's indicated that both Mr. Spensieri and Mr. Elston have withdrawn their amendments and amendments to amendments, so we are left with Mr. MacQuarrie. Would you please make your motion?

Mr. MacQuarrie moved that clause 20(2)(b) of the act as set out in section 1 of the bill be struck out and the following substituted therefor:

"(b) the right to direct the education, the cultural upbringing, the moral training and the religious training of the child in the best interests of the child."

Mr. MacQuarrie: I think the latter seven words are not part of the clause as such of the subsection.

Interjections.

Mr. Chairman: I'm sorry, Mr. MacQuarrie. In the first part that you read what were you deleting?

Mr. MacQuarrie: Section 20(2)(b).

Mr. Chairman: Subsection (b) only. Fine. Then you don't need to refer to those last seven words, correct?

Mr. Spensieri moves that Mr. MacQuarrie's amendment be amended by adding the words "and responsibility" after the words "the right" in the said subsection (b).

Mr. Spensieri: The section would now read: "the right and responsibility to direct the education, the cultural upbringing, the

moral training and the religious training of the child in the best interests of the child."

Mr. Renwick: Mr. Chairman, I would move a further amendment to add those same words in item (a).

Mr. Chairman: Mr. Renwick, I question whether yours can be an amendment of the amendment of the amendment because the original amendment dealt with (b) and yours is (a).

Mr. Renwick: I was afraid you were going to say that. I thought to move it later. We can repeat the discussion later.

Mr. Chairman: We'll put you on reserve with Mr. Elston.

Mr. Renwick: I thought it would facilitate things if we dealt with that matter of the addition of "responsibility" and let the amendment of item (a) fall on the decision with respect to this amendment as well.

Mr. Chairman: We are dealing now with Mr. Spensieri's amendment to Mr. MacQuarrie's amendment.

Mr. Elston: I have one comment. I think we should vote on it right away because we've really gone on.

Mr. Chairman: Yes. We are voting on Mr. Spensieri's amendment. All those in favour of Mr. Spensieri's amendment to Mr. MacQuarrie's amendment raise their hands. All those opposed raise their hands.

Motion agreed to.

Mr. Chairman: The motion carries by five to four with one abstention. Again I reiterate that according to Beauchesne a member may not be forced to vote, although there is no provision for abstention.

Mr. Piché: This is a negative vote, then, according to Beauchesne.

Mr. Chairman: He may not be forced.

Mr. Piché: Yes, but if he doesn't vote it has to be taken as negative.

An hon. member: That's right.

Mr. Chairman: No. He may not be forced. It's five to four with one abstention, and the chair cannot force him to vote.

Mr. Piché: Beauchesne calls for that.

Mr. Chairman: Would you quote the page to the chair?

Mr. Gordon: Page 67, paragraph three, line four.

Mr. Chairman: The member for Sudbury has his foot in his mouth as he states that.

Now, that has carried. The words "and responsibilities" have been added to Mr. MacQuarrie's amendment. There's no more discussion on Mr. MacQuarrie's amendment.

Mr. Mitchell: Mr. Chairman, I don't wish to challenge you, but, I'm sorry, I thought you said Mr. Spensieri's lost.

Mr. Chairman: No, no. It carried five to four with one abstention.

Mr. Mitchell: I'm sorry.

An hon. member: You're asleep.

Mr. Renwick: You must challenge the chair, then, if you are going to challenge it.

Mr. Chairman: Mr. Mitchell did not vote, and the vote was five to four. Mr. Gordon voted--

An hon. member: No, he didn't. He pulled his hand down.

Mr. Chairman: He put his hand up.

Interjections.

An hon. member: Mr. Chairman, I think you got confused there. Mr. Gordon put his hand up twice.

An hon. member: I support the chair.

Mr. Piché: In all fairness to the chair--

Mr. Chairman: I counted the (inaudible) fundamental things here as we're putting our hands up. I counted the three Liberals, the two NDPs and Mr. Gordon, the member for Sudbury, as voting in the affirmative with their hands up. I counted Mr. Piché, Mr. MacQuarrie and Mr. Hennessy and Mr. Kolyn as voting in the negative, and Mr. Mitchell's hand was not either affirmative or negative. Now, would the member for Sudbury tell me if I am incorrect?

Mr. Gordon: Reread the amendment.

Mr. Chairman: No, I'm asking for clarification. There seems to be a question of whether Mr. Gordon did have his hand up or not on the amendment of Mr. Spensieri.

Mr. Renwick: --motion, for God's sake.

Mr. Laughren: Come on, why are we doing this?

Mr. Gordon: Reread the motion.

Mr. Laughren: You can't take a vote twice.

Mr. Chairman: We cannot vote again.

Interjections.

Interjection: Why is there any need?

Mr. Chairman: Because members have questioned whether Mr. Spensieri's--

Mr. Laughren: Let them challenge the chair, then.

Mr. Chairman: The chair has found that the motion carried, six to four with one abstention.

Interjections.

Mr. Gordon: The chairman is correct.

Mr. Chairman: The chairman is correct: the member for Sudbury has confirmed that. Thank you.

Now, we are voting on Mr. MacQuarrie's amendment, which will carry with it the words "and responsibility" being contained after the word "right" in, I believe, line 1 of subsection 2(b). There will be no further discussion.

All those in favour of Mr. MacQuarrie's amended and amending motion please raise their hands. All those opposed raise their hands.

Motion agreed to.

Mr. Spensieri: --a novice, Mr. Chairman.

Mr. Chairman: So long as people don't see the hands differently from the chair, the chair may keep himself straight.

Fine. We have carried Mr. MacQuarrie's amending motion. Is there any other discussion with regard to section 20(2)? I believe, Mr. Renwick, you have withdrawn your proposed amendment that was delivered to the chair previously?

Mr. Renwick: But I do want to move a further amendment to section 20 before it's put.

Mr. Chairman: Section 20 subsection what?

Mr. Renwick: Item (a).

Mr. Chairman: Fine. We're at that point. Mr. Renwick?

Mr. Renwick: Unless Mr. Spensieri wishes to do it.

Mr. Renwick moved that section 20(2)(a) be amended by adding the words "and responsibility" after the word "right" so that item (a) will read "the right and the responsibility to care and control of the child."

Mr. G. W. Taylor: Mr. Chairman, if we are going to have consistency in the two sections to ease the amount of debate and reduce it, and since it would appear now to be something contrary to the ministry's position in section (b), it might just as well appear in section (a), and I have no reluctance to insert that request if it is going to be a consistent piece of legislation. So if Mr. Renwick wants to make that motion, I have no objection.

11:10 a.m.

Mr. Renwick: I think we are ready for the question.

Mr. Chairman: Right. I presume we have heard that Mr. Renwick made a motion--and the parliamentary assistant has said his position is agreeable with that motion--that the words "and responsibility" also be added after the word "right" in section 20(2) (a).

If there is no further discussion, all those in favour of Mr. Renwick's motion, raise their hands. I read eight. All those opposed to Mr. Renwick's motion? I read three.

Motion agreed to.

Mr. Chairman: Is there any more discussion on section 20(1), (2), (3) and (4)?

Miss Kitley: Mr. Chairman, section 20(3) has in it the words "on behalf of them," which seem to imply that one parent or one custodial parent could pledge the credit of a co-custodial parent. It seems inappropriate that there should be a pledging of credit. If the words "on behalf of them" were deleted, then it is evident that only the person who is making the decision is on the hook for paying for the decision.

Mr. Chairman: Again, I am sorry?

Miss Kitley: Just the words "on behalf of them" in the third line. They mean, for example, that if there are two custodial parents one could put the child in a private school and the other would, on the face of it, be financially responsible for that.

Mr. Spensieri: Is that limited to cases of joint custody, if there is such a thing?

Miss Kiteley: This is where there are at least two people entitled to custody, yes. It could be more conceivably.

Mr. Elston: This could develop before a separation agreement or before a court order, I would think, because both would be entitled to custody before an order or a separation agreement determining which one actually had custody.

Miss Kiteley: That is correct.

Mr. Elston: So it would be a case where someone might move away and go into a private school with the child, and then the

other parent, who is still entitled at this point to custody, would be responsible for whatever costs would be incurred.

Miss Kiteley: Could be financially responsible, yes.

Mr. Cunningham: You would suggest that we delete "on behalf of them."

Miss Kiteley: Yes.

Mr. Chairman: Other comments?

Mr. Spensieri: Just one comment. If both parents have the right to custody, or have entitlement to custody or to different aspects of custody, what is really wrong, on a policy basis, with both of them having their financial assets exposed in this manner? What is the mischief, as judges are fond of saying? Are you really saying that, as a matter of policy, you do not think one person should be able to pledge both sets of assets?

Miss Kiteley: Yes.

Mr. Spensieri: But if a right to custody exists in both of them, there ought to be a corresponding liability.

Miss Kiteley: But this goes to the exercising of the right. It is simply, if a custodial parent seeks to exercise the right in a certain fashion, why should the other custodial parent be responsible financially?

Mr. Spensieri: Presumably because a court handed down that aspect of custody, say, the right to send to a private school. It was an incident of custody that devolved on one parent in the knowledge that both parents would be contributing. I do not see that as being a horrendous consequence.

Miss Kiteley: This could take place before a court order.

Mr. Spensieri: But it would be by agreement of the parties.

Miss Kiteley: No, it would not necessarily be. That is the difficulty.

Mr. Spensieri: You are talking about de facto custody before anybody does anything?

Miss Kiteley: Even though parents are living together, there could be a dispute between the two of them. One might want a religious education and one might not. If the custodial parent puts the child in a religious school, the other parent could be responsible for the financial cost of that.

Mr. Renwick: Mr. Chairman, I recognize what Miss Kiteley is saying, but it is a pretty common characteristic that somewhere along the line somebody has to draw the line. What this simply says is that, as far as the outside world is concerned, if there is joint custody, the person dealing with that joint custody situation

can rely on one of them. That is my version of it. I hate to be so esoteric about it, but it seems to me to be the equivalent of, in family affairs, the indoor management rule, where they have to sort it out themselves if there is joint custody vested in two or three people.

I think also--I can never get it straight--that is the way trusts operate as well. As far as the outside world is concerned, if there is more than one trustee, you can rely on any one of the trustees acting in conformity with it. You can correct me, because I may have got that wrong.

Mr. Chairman: No, my memory is that with executors you must have all, but with trustees you can have one and they differ.

Mr. Renwick: That is right. In other words, it is a version of the indoor management rule. Persons dealing with that entity can rely on it being done and, if it is a problem, they have to sort it out internally. That was my understanding of why subsection 3 is in there. I would appreciate it if Mr. Shipley might comment on that. I may be quite wrong, but that is the way I have interpreted it.

Mr. G. W. Taylor: Yes, Mr. Renwick, your understanding of section 20(3) is correct and that is the background and reasoning of the section.

Mr. Laughren: If that section were not in there and it says "where more than one person is entitled to custody," that means there is joint custody. That is basically what it means, right? If you did not have that in there, would it not imply that there had to be complete agreement between the two people involved as to the rights and responsibilities, and accepting the responsibilities? If you had it that way, if there could not be agreement between the two people, you would surely have a Texas standoff. I don't know how you could have it any other way than one parent exercising the right and accepting the responsibility. Maybe you could tell us how it would work if you did not have it that way. I don't like it this way either, but I don't know how you could have it any other way.

Miss Kiteley: I don't see that deleting those words "on behalf of them" changes the ability of one of the parents to exercise the right and accept the responsibility. Deleting those words does not do anything to the concern you raise, in my view at any rate.

Mr. Chairman: The chair would perhaps draw an analogy. Mr. Renwick has drawn one. I would draw an analogy with joint shareholders. Usually in the bylaws of the corporation it will set forth joint shareholders, and it will say that any one of them can vote on behalf of all joint shareholders. This is similar. I believe the idea is exactly that, if you had 10 joint shareholders of one share certificate, it stops all 10 of them going in opposite directions. I guess this is the indoor management rule or the joint shareholders concept. Mr. Laughren said, and it would be also my thought, that if they went in opposite ways they would have a tie and do nothing. What is your reaction to that?

11:20 a.m.

Miss Kiteley: Unfortunately, it seems the section is extending the existing common law principle of the ability of a parent to pledge the credit for necessities. That still exists but this has gone much farther. It is pledging credit for anything. If that is what the ministry intended, then I think it should be a little bit clearer than that. It is a real extension of the existing principle. You can pledge for any reason whatsoever.

Mr. Spensieri: Even beyond necessities.

Miss Kiteley: Yes, on the wording of that section.

Mr. Chairman: Is that the ministry's intention? Would you comment on that, Mr. Shipley?

Mr. Shipley: I think it is very questionable whether a parent who is pledging beyond necessities is, in fact, then exercising the rights and responsibilities of a parent. The right to do that is qualified by exercising the rights and responsibilities of a parent. The responsibilities of the parent are to provide for the minimum level of education, support or whatever. The responsibility of a parent isn't to send the child to Upper Canada College; the responsibility of the parent is to educate the child. The problem, of course, as some of the members have pointed out, is that it does extend to many other situations beyond the education or financial one. It may be that some kind of consent or something like that is required.

Miss Kiteley: Is Mr. Shipley suggesting that the words "rights and responsibilities," which the committee have dealt with for the last hour and a half, are the minimum requirements only? There is a minimum and a maximum and these words refer only to a minimum? Did I understand Mr. Shipley to say these words are of a minimum nature only? In other words, a responsibility is to send the kid to a public school but not to Upper Canada College?

Mr. Shipley: Yes, I think that is correct.

Mr. Chairman: Are there any other comments with regard to section 20(3)?

Mr. Renwick: I still do not understand what the result would be if one were to delete the words "on behalf of them." Miss Kiteley, are you saying that, as between the two parents, one could deny any liability with respect to that child if the other parent had gone and enrolled the child in Upper Canada College? Are you saying one parent could deny any financial responsibility for that?

Miss Kiteley: If those words remain in, then both parents are responsible.

Mr. Renwick: So if you take them out, one could deny any financial responsibility.

Miss Kiteley: Then the parent who accepted the

responsibility and performed the function of placing the child in the institution is on the hook financially.

Mr. Renwick: Solely. That is my problem. I don't think it can work that way. I think if one parent, in all good faith as far as the outside world is concerned, doing nothing to raise any question in people's minds, goes out and enrolls the child in a private school, the persons at that school assume it is being done lawfully, that is, with the consent of both parents who have joint custody. I think that assumption has to override any question. If it then comes down to the question of a default by the parent who took the child to that school, it seems to me the school should be entitled to come against both of the parents. That would be my view.

I think it is one of those equity situation. All it comes down to is, who the hell bears the loss? But to make it function, I think you have to give the benefit that if a parent appears at some particular place, there is no duty to inquire about the joint responsibility of the two parents financially for an obligation that one has incurred on behalf of the child, and the problem has to be worked out between them. I am not suggesting there is not merit in your point. The point is there, but I think you have to make that kind of decision in practically all joint situations. That would be my view of it.

Mr. Chairman: Shall subsection 3 carry? Carried.
Subsection 4?

Miss Kiteley: The written submission made by the bar association proposed a change to that subsection to make it absolutely clear about access and incidents of access. I understand my predecessors, Mr. Preston and Mr. Davis, made the point of incidents of access and I am not sure of the exact result, but I gather the committee was not enthralled with the suggestion, but the proposal made would include the incidents of access, and there is absolutely no question. If the members have the submission, the subsection would read, according to the proposal:

"Where the parents of a child live separate and apart and the child resides with one of them, the right of the other to exercise the entitlement to custody and the incidents of custody is suspended until a separation agreement or order otherwise provides; however, the other shall be entitled to access and the incidents of access, unless an order otherwise provides."

Mr. Chairman: I believe it was well aired under section 19(a) and there was a motion by Mr. Renwick, which failed. Unless someone has something to add, shall subsection 4 carry? Carried.

Mr. Renwick, do you have an amendment on subsection 5?

Mr. Renwick: Yes, Mr. Chairman. I was almost intimidated by the previous discussion about it, but I am now supported; Miss Kiteley has given me renewed courage.

Mr. Chairman: Mr. Renwick moves that subsection 5 of section 20 be amended to read as follows:

"(5) The entitlement to access to the child includes the right to make reasonable inquiries and to be given information as to the health, education and welfare of the child, and such other attributes as a separation agreement or order may provide, and the responsibility for the welfare of the child while in the charge of the person entitled to access."

Mr. Renwick: You will note I have made a change because my amendment got garbled. In the second last line, if you have the typed copy which I distributed, change the word "on" to "or," and in the last line change the word "care" to "welfare," insert the word "the" in front of "charge," delete the word "child" at the end and insert the words "person entitled to access." I regret that garbled amendment.

11:30 a.m.

There are two points in it. The opening words are identical with the words as printed in the bill. I have added the clause, "and such other attributes"--because we had this long discussion about incidents and the meaning of that, so I changed it to attributes--"as a separation agreement or order may provide." In other words, the separation agreement or order might very well specify many terms and conditions related to the ambit of the access to be granted. I wanted to make certain it was fully understood that either the separation agreement or the order could determine the ambit of the access by having such attributes as might be provided therein.

Second, I think it is important--we had this discussion earlier about the correlative nature of the responsibility to the entitlement--I have added "and the responsibility for the welfare of the child while in the charge of the person entitled to access." It does seem to me to be important that while the child is in the charge of that person who is entitled to the access, that the person be responsible for the welfare of the child during that period of time. Some people may say that would flow from it, but I think where we have been stating rights and stating correlative responsibilities it makes sense to add that. I would urge the support of the committee as being consistent with the discussions we have had to this amendment.

Mr. Spensieri: To the extent that this amendment makes clear the fact that custody has certain incidents attached to it and access similarly has certain attributes or subsections of custody, to the extent that it makes this clear and brings our thinking more into line with the thinking in the profession, it is a welcome amendment which we would certainly support.

Miss Kiteley: The amendment is in line with the submission made on behalf of the bar association, but the association went somewhat further in its proposal. It is that the inquiries be made and the information be given either from the custodial person or any other person or institution. Mr. Renwick's amendment does not meet that problem. It does meet the problem that the information be given, which is not in the bill itself. The difficulty arises in that one could foresee that the access parent makes the inquiry of the custodial parent and the parent not have

the information. The way the amendment now reads, that would be the end of it. The suggestion was that the access parent be able to get the information from the source of the information.

Mr. MacQuarrie: With the ambit of the attributes of access mentioned by Mr. Renwick, I think this section is by no means exclusive. It just simply specifies what rights are included in an entitlement to access, but if other rights are specified in a separation agreement or what have you, this section certainly does not exclude the exercise of those rights.

As far as being entitled to information as to the health, education and welfare of the child, I think the noncustodial parent would look first to the custodial parent for that information, but when a statute gives a right to the noncustodial parent to information regarding health, education and welfare, first, I think the noncustodial parent would be able to approach the educational authorities to get a statement as to the educational standing and training of the child.

I would think the noncustodial parent should be able, reasonably, to make inquiries of the physician who is attending the child, or the public school nurse or what have you, in terms of information as to health. Information as to the welfare of the child certainly could be determined by the noncustodial parent on occasions of access. I think we are unnecessarily complicating the section.

Mr. Mitchell: Mr. Chairman, basically my comments follow the last words of Mr. MacQuarrie. I find the wording here just seems to completely complicate subsection 5. Quite honestly, I thought we had dealt with and discussed the word "attributes" at some length some time back. I recognize the concerns Mr. Renwick is putting forward but we are complicating a section that is quite clear in its wording at the moment.

Mr. Renwick: I just want Miss Kiteley to understand why I did not elaborate on that right, which is spelled out in subsection 5. I take it that whatever the state of the law may be at the present time it is at least questionable whether or not a parent entitled to access only is able to get a response from third parties about those topics.

Certainly I would have liked to have seen it spelled out to make it quite clear but it was such a big advance that it seemed to cover the problem until such time as somebody tells me that it doesn't. Both constituents and clients of mine have had situations where the parent entitled to custody has gone to the school or to the doctor and said, "I am entitled to custody and I do not want you to tell my former husband or wife anything about the health or the education of my child."

The former parent arrives at the school in all good faith to ask how Susie is getting on, or writes a letter to the school or to the doctor and says: "I understand my daughter has been ill. I would certainly appreciate knowing professionally how the child is doing." In the face of a blanket demand by the custodial parent the third party is put in an extremely difficult position and usually

refuses. It is not a nebulous question. It is a very down-to-earth question.

My problem with Mr. MacQuarrie's suggestion, that by adding this it leaves other aspects of access open, is that I consider this a statutory clarification of a problem and an extension of the normal attribute attached to access. It is because of that limited sense and because this was an extension that I wanted to make it clear that this could be there but, by agreement or by order of the court, it could contain more specific requirements.

In the question that I put directly in front of you, rather than spelling it out to say that somehow or other the access parent was entitled to go to the school, or to any third party and get this information. Rather than spell that out, I was trying to say in here that those matters can be clarified, both with respect to the inquiries and the information, but also with respect to other aspects of access by spelling it out in a separation agreement or in an order, because I can see right now that lawyers will sit down and, in looking at this, they will spell out and try to make very clear what we will not be making clear.

11:40 a.m.

In agreement, or in accord, I can see a judge simply saying, "I want it clearly understood that Mr. so and so or Mrs. so and so has the right to go to X public school and get information about the education of their child." That is the way my thinking was going and I felt that included in this was the right to get the information from third parties.

I notice that all of my colleagues in the profession nodded their heads about the question of the custodial parent going to the school or the doctor and saying: "Look, do not tell that son of a bitch anything about my child. I have custody of him." Delete that.

Mr. MacQuarrie: One of the points I was attempting to raise is that this section now gives that parent the right to make reasonable inquiries and presumably from third parties.

Mr. Renwick: That is the way you read it.

Mr. G. W. Taylor: Mr. Shipley may have some comment on this section.

Mr. Shipley: Mr. Renwick, I just wanted to direct you to subsection 7 in case that had slipped by. It clearly recognizes that any entitlement to access is subject to alteration by a court or separation agreement. That is what we intended to do there. To make sure that you can either increase or decrease the rights that are conferred in subsection 5 or anywhere else.

Mr. Renwick: I would withdraw my amendment to subsection 5 if you would just add the words "or access" after the word "custody" as it appears at the end of the first line so that it would read, "Any entitlement to custody or access or incidents of custody or access under this section is subject to alteration." I would be perfectly happy with that.

Mr. G. W. Taylor: Mr. Renwick, could you specify where you wanted that word inserted again in subsection 5?

Mr. Mitchell: No, at the end of subsection 7, at the end of the first line add "or incidents of access".

Mr. Shipley: My view would have been that when you are reading subsection 5 where it says, "any entitlement to custody or access," then you can incorporate subsection 5 which says some of the things that access includes, and then you continue on so that the incidents of access phrase is unnecessary.

Mr. Renwick: Well, if you added the words "or access" at the end of the first line of subsection 7, I would be quite happy.

Interjections.

Mr. Chairman: We are back to Mr. Shipley reminding Mr. Renwick of the existence of subsection 7. Were you completed with your comments, Mr. Renwick, regarding your amendment?

Mr. Renwick: I think everyone would agree that there is a problem. I think this has gone some way to reaching the problem, but I do not think for one single moment it is going to solve the practical problem that appears.

One can envisage that the access parent arrives at school to speak to the principal of the school and asks about the education of the child. The principal of the school says: "I would love to tell you but the custodial parent was in here yesterday and told me I was not to give you any information. He or she has custody and I am sorry, access parent, I cannot give you that information."

Then the access parent says: "But I have the copy of the act here. This says the entitlement to access "includes the right to make reasonable inquiries and to be given information as to the...education...of the child." I do not know what the principal would say then. He probably would say: "Well, that is between you and the other parent, Mr. So and So. You will have to sort it out among yourselves."

Mr. Chairman: He refers it to his superintendent.

Mr. Renwick: All I am saying is without clarification in here do not let anybody kid themselves that in the real world, not in Riverdale because these things do not happen in Riverdale, but in St. David or Yorkview or something like that, where parents have problems, then it will not answer the question. In the real world, in the world of lawyers it makes money, but not from the point of view of solving problems for people.

Miss Kiteley: On the same point, we have been dealing with the education. The medical is even more important. I could foresee a physician saying: "Sure the act says that, but I need written direction and I will only take a written direction from the custodial parent."

You are not going to get anything out of that doctor unless the section says the information can come from the source of the information. This is a problem which comes up day in and day out on access problems. You are inviting court litigation over whether the source of the information can be required to give it up. You are inviting doctors and educational institutions to become involved in it, to be served with notices of motion as to whether they have to give the information. To overcome the problem, you need only say that the source of the information has to give it up.

Mr. Renwick: My only comment is that I would ask the ministry to take that very seriously between now and the time the bill comes back. I do not think we can advance the argument further. I do not think it is something that lends itself to simple committee change of a few words to solve it. It is a major problem and there has to be some real clarification of that right if it is to have any meaning and further solutions of problems rather than causing continual controversy.

Mr. G. W. Taylor: I think you are quite correct, Mr. Renwick. I will discuss it with the minister. The other features you have mentioned in your amendment, I do not think at this time I can agree with the amendment as you have put it. I understand what you are trying to achieve.

There are two features, and you are adding another feature to gain more information from another source, being that of separation. Then you are adding another feature on, a responsibility feature. Then, as Miss Kiteley has mentioned, could the section be more emphatic so the person with the information, be it another public body, has to offer up the information? We run into numerous statutes where, at this point in discussion, I know there would be conflict and I would have to discuss that more thoroughly with the Attorney General.

Mr. Renwick: I would certainly ask Miss Kiteley, if she and her colleagues at the bar have any positive draft solution to that major question, not to hesitate to get it into the hands of the ministry because I think it would be most helpful to everybody if that were solved in committee of the whole House.

Mr. Mitchell: I was going to move that the question be put and then, after that question is put, could we refer to some procedural--

Mr. Renwick: I would withdraw my amendment in the light of the comments made by the parliamentary assistant.

11:50 a.m.

Mr. Chairman: Thank you, Mr. Renwick. You were coming very close, Mr. Mitchell, to moving the previous question. I am not sure you have--

Mr. Mitchell: It has now been withdrawn.

Mr. Chairman: Yes. I am not sure you realized that you were coming close to that.

Mr. Mitchell: No, I wish to be able to get into some procedural matters, Mr. Chairman.

Mr. Chairman: Can I then carry those two and gain inch by inch here? Are there any other comments with regard to subsections 5 and 6 of section 20? If not, shall sections 5 and 6 of section 20 carry? Carried.

Mr. Mitchell: If subsection 7 can be carried, please continue. It would be better--

Mr. Chairman: Fine. Mr. Renwick has an amendment to subsection 7.

Mr. Renwick: No, Mr. Chairman. In the light of this discussion, I am going to withdraw that amendment. I do not think anything useful could be added.

Mr. Chairman: Shall subsection 7 of section 20 carry? Carried.

Mr. Chairman: Shall section 20, in its entirety, as amended, carry?

Mr. MacQuarrie: No.

Mr. Chairman: Shall we go back? We had better go back. All those in favour of section 20, in its entirety, as amended, carrying, raise their hands please. All those opposed to section 20?

Section 20, as amended, negatived.

Mr. Chairman: Mr. Elston, that is all right. Even if it had stayed five and five, the chair would have had to go in a certain way.

Mr. Elston: I know.

Mr. Chairman: Mr. Renwick moves that the bill be reported to the House.

We have a motion in front of us. Excuse me, may the chair take a second thought? We do not have section 20 carried. We are back where we have section 20--we are back at the end of section 19. Am I correct?

Mr. Laughren: That is not part of the bill then.

Mr. Elston: Section 20 does not become part of the bill, as I see it.

Mr. Chairman: Yes. That is where we are. We have a motion on the floor. Is there further discussion of Mr. Renwick's motion that the bill be reported? All those in favour of Mr. Renwick's motion raise their hands, please. All those opposed to Mr. Renwick's motion raise their hands, please.

Motion negatived.

Mr. Chairman: Mr. Renwick's motion fails six to five. The bill shall not be reported.

Mr. Renwick moves we continue our discussions, that we not adjourn at this time.

Mr. Hennessy: Mr. Chairman, we agreed yesterday at noon that we would adjourn today.

Mr. Renwick: We did not agree to have the process of this committee made a farce.

Mr. Hennessy: I am not concerned about what came up. Mr. Laughren and I asked that question yesterday and it was agreed that we have to go back home, and in all fairness to us, this was decided by this committee.

Mr. Chairman: The chair will keep control. Mr. Hennessy, it was understood and everybody did understand. It was not put in the form of a motion. If it is now put in the form of a motion. That has to take precedence over an understanding we had.

Mr. Laughren: I must say, in response to Mr. Hennessy, when that agreement was made yesterday it was on the assumption that the rules under which this committee was operating, or the unwritten rules anyway, would not change. It is obvious by what has just happened that the rules have changed as to the way this committee is going to operate. I certainly have no sense or no obligation to adhere to what I agreed to yesterday if this committee is going to change its modus operandi that way.

Mr. Chairman: Excuse me. I do not understand your reference to the rules changing, Mr. Laughren.

Mr. Laughren: The very matter that after we passed a subsection of a section that the government members of this committee then vote against the entire section. You know exactly what I am talking about, Mr. Chairman. You indicated that if you had the vote you would have voted that way too. So it is not as though you do not understand what I am saying.

Mr. Chairman: I understand but I want you to define--

Mr. Laughren: That is not the way you have been operating.

Mr. Chairman: I want you to define what you meant by the rules changing. The technical rules of voting have not changed.

Mr. Laughren: Not the technical rules, no--just the way the committee operates.

Mr. Renwick: My colleague is perfectly right. You understand what has happened. We went item by item through each subsection of the bill; each subsection of the bill was carried; certain amendments were carried, and then you put the question with respect to the section.

Mr. Chairman: We do not differ on what has occurred. I just want it on the record that the technicalities of voting procedures have been followed. Whether the spirit has been followed is a different matter.

Mr. Laughren: We know it has not.

Mr. Chairman: Mr. Renwick, do you have a motion on the floor?

Mr. Renwick: Yes, that the committee continue its process through the rest of the day.

Mr. Chairman: The parliamentary assistant has asked me a question and I will put it to the committee. We can do anything we wish with the unanimous consent of the committee. Does the committee wish to set aside any vote and reopen anything? The answer would have to be unanimous, of course.

Mr. Renwick: I do not know whether it has to be unanimous. A motion would have to be put by a person who voted against the issue in order to have it reopened. That is my understanding.

Mr. Chairman: There has been a vote taken and carried by a majority. We would have to have unanimous consent to reopen or set aside a vote.

Mr. Renwick: I understood it could only be on a motion by a person who had opposed the motion.

Mr. Chairman: That could well be.

Mr. Mitchell: Mr. Chairman, I am going to seek some guidance from you. First, if that motion is made to reopen and it carries, that is one thing. Second--and I want to know the chairman's position--we had agreed yesterday, albeit not in a formal vote, that we would adjourn at noon today. It was with the concurrence of, and in fact on the suggestion of, those on the other side, that we would adjourn at 12 noon and come back at a time to be decided by the chair.

I would like to be assured that that is the procedure we are going to follow; that the chair recognizes what was a consensus yesterday and that we will not continue sitting beyond 12 o'clock. We will be recalled at the call of the chair. Is that correct?

Mr. Chairman: No, that is not correct. I will hypothetically state what the chair will rule. I have in front of me a motion that takes precedence over understandings, agreements, et cetera. Motions are what a committee operates by. Once that motion is dealt with, if the motion is defeated--

Mr. Mitchell: Well, call that motion then.

Mr. Chairman: Let me finish. If that motion is defeated, then we will rise at 12 o'clock and I, or whoever is the chairman

of the justice committee after the House reconvenes in March, will report the progress back to the House. That is what the chair will do unless the committee directs otherwise by vote.

Is there any other discussion on Mr. Renwick's motion to carry on throughout the day?

Mr. Cunningham: I think it would be a great idea.

12 noon

Mr. Chairman: All those in favour of Mr. Renwick's motion will please raise their hands. That is six votes.

All those opposed will raise their hands.

The motion carries.

Mr. Renwick is a most reluctant bride with his hand on that motion.

Mr. Piché: The vote was five-five.

Mr. Chairman: It was six-five.

Mr. Renwick: I am not prepared to accept. I invite Mr. Mitchell to move a motion to reopen section 20.

Mr. Mitchell: Mr. Chairman, I seek some guidance here. I still have some concerns about section 20; I don't retract at all the support I gave to specific areas. However, I have some concerns as to the strength and use of certain words which were inserted, even though I argued very vehemently for them. That's where my problem is.

I feel that we were working towards a very good end. I had become concerned, and I talked to the legal people, that we might be creating more difficulties in the court by the use of certain words used in subsection 2. It is to that extent that I am concerned. If the committee would agree to open the matter to the extent of reviewing section 20(2), so be it. That's the only portion I wish to have reopened.

Mr. Elston: Mr. Chairman, I think that's silly. We worked very hard and very long on this, and we saw we were accomplishing certain objectives by the amendments that were proposed. We voted on them and they were carried.

I don't know if Mr. Mitchell has had an opportunity to speak to people who are out there in daily practice before the bench dealing with children and with the judges that have to make these decisions, but we have heard from members of the Canadian Bar Association, and we have gone a long way to assist in some of their concerns. If the only reason that he wants to open it is to look at one subsection--it is either the whole thing or nothing at all.

Mr. Chairman: We are not on the merits of it now. Miss Kiteley, do you have any comments?

Miss Kiteley: I have a comment, sir. You may tell me I am out of line on this. Obviously it is not my business how the committee runs its business.

I can say that Mr. Preston, Mr. Davis and I have worked very hard in making an oral and written submission and appearing before your committee all week. The three of us and our subsection are most interested in this particular bill, but we are not so interested that we are going to waste our time. Over the lunch hour I will be consulting with my colleagues as to whether we should return.

Mr. Chairman: Thank you. That comment is justified. However, I might point out, Miss Kiteley, that also is how the Legislative Assembly and its committees often do operate.

Mr. Renwick: Definitely not.

Miss Kiteley: Not that way.

Mr. Chairman: There are imperfections in the procedures in this House.

Mr. Piché: And with the legal profession, Mr. Chairman.

Mr. MacQuarrie: Mr. Chairman, I would move that section 20 in its entirety--

Mr. Chairman: Excuse me. The chair is going to make a comment here. My friend, and I mean "my friend" more than just the way a solicitor uses it, Mr. Piché, I take offence and I am sick to death of the veiled references to solicitors. We have had it from Mr. Laughren, from Mr. Cunningham and now from Mr. Piché in this sitting.

Mr. Laughren: I doubt that.

Mr. Chairman: In 20 years of practice in the county of Oxford, I have not been subjected to the references to solicitors generally. I take offence--

Mr. Laughren: Oh, the poor chairman!

Mr. Chairman: Mr. Laughren, I have the chair and I have the floor and you do not. I have had about enough of these references; I suspect the other solicitors have too. I am not used to it in the county of Oxford, and I don't intend to come to Toronto and be subjected to it by the member for Nickel Belt or elsewhere.

Mr. Laughren: Welcome to Queen's Park.

Mr. Cunningham: He wasn't the one who made the reference. It was your member from Kapuskasing.

Mr. Chairman: That is the third reference this week, Mr. Cunningham, and I have had about enough of these references to

solicitors generally.

Mr. Cunningham: But don't (inaudible) the people making them. He's the one that made the disparaging comments.

Mr. Chairman: This has been a year in coming. Maybe your own friends, solicitor friends in your own party, don't appreciate it either. I think it is time somebody spoke up for the solicitors and against the slights or slurs.

Mr. Cunningham: Mr. Chairman, why did you remonstrate with the member for Nickel Belt when the comment was made by your own caucus member from Kapuskasing?

Mr. Chairman: I was referring to your reference earlier this week too.

Mr. Cunningham: Which was what?

Mr. Chairman: Fine. Thank you. The chairman has that off his chest.

Mr. Piché: The solicitors are painting themselves into a corner. They have got to take criticism the same way we do.

Mr. Chairman: Not continually throughout the year, almost daily.

Mr. Piché: The odd time. Mr. Chairman, I think the statement you just made--

Mr. Mitchell: Mr. Chairman--

Mr. Chairman: Yes, Mr. Mitchell.

Mr. Piché: Just a minute. I have the floor. Mr. Chairman, I would like this matter to be brought back. I think you have taken the statements I made a while ago out of context, and I would like to bring this thing back, not right now, but I would like to bring it back. Solicitors, like everybody else, should take some criticism. They are not up there and we are down here. If we have problems with the legal profession over what is happening in the administration of justice, you know who has been governing us into that.

Mr. Chairman: Yes.

Mr. Piché: And I would like to bring it back.

Mr. Chairman: It is my objection to the singling out continually of the legal profession in a detrimental fashion. Mr. Mitchell.

Mr. Mitchell: I have a two-pronged motion, Mr. Chairman. I would move that section 20 be reopened; however, that the reopening and the deliberation of the bill be continued at the call of the chair and that the committee adjourn as of this point in time.

Mr. Chairman: Mr. Mitchell, might I ask you to change your wording slightly at the beginning to say, "have the vote as to section 20 in its entirety be set aside"?

Mr. Mitchell: So worded, Mr. Chairman.

Mr. Chairman: And your second portion of that motion was that we adjourn now, to be reconvened at the call of the chairman of the justice committee?

Mr. Mitchell: That is correct.

Mr. Renwick: I am not commenting about the motion. I would just like some information about what the chairman has in mind about the call of this committee.

Mr. Chairman: The chairman would propose--

Mr. Renwick: You know we all have timing problems. We are all going to have notice, and I think we have an obligation to report the bill the first day the House goes back. We have to complete our work in the interval. I don't want to go into the session with this bill hanging over our heads.

Mr. Chairman: It is my understanding, having consulted the permanent clerk of this committee yesterday evening, that when we reconvene there is no justice committee constituted. We no longer are members, but there is a new session and there will be a new group of 12 appointed and a new chairman elected, whether the same or different. Therefore--

Interjection.

Mr. Chairman: It would be the first or second meeting. In answer to Mr. Renwick's comment, as I said before, it would be my intention that this would be reported back by myself, if I were still technically the chairman, to the House immediately upon the House reconvening in March.

Mr. Renwick: My question was quite simple. Are we going to complete the bill during the interval?

Mr. Chairman: No.

Mr. Renwick: You are not?

Mr. Chairman: It would be back in March when the House is sitting, because we have had various members stating that they had difficulty over the next several weeks. We have several members who are going to be on the procedural affairs committee and will be out of the country.

Mr. Mitchell: Mr. Chairman, with respect, I appreciate the fact that the members here, because of the type of bill we are dealing with, would like to proceed with it. It was to that end that I moved that section 20 be reopened.

12:10 p.m.

I think in our discussions yesterday, at least certainly what I discussed with some of the members here, some of us do have a time problem, but I suggest to you, on the basis of what was in Hansard, it is quite conceivable that you could call this committee back into session before the House reassembles so that the bill can be reported.

If you would accept an amendment to my motion or allow me to reword my motion, I would basically leave it that section 20, as you have worded it, be reopened and, further, that we adjourn our deliberations at this time, to be recalled at the call of the chair prior to the opening of the session, so that we can complete our deliberations on the bill before reporting to the House.

Mr. Chairman: One comment I have is that this bill will not become law until the House comes back in any event; so it doesn't speed it up or slow it down as to becoming law. Also, the standing committee on the administration of justice would have no business in front of it immediately upon coming back--

Mr. Mitchell: My motion stands.

Mr. Chairman: Right--and there would be something then in front of the then justice committee to start up with immediately, on its plate, so to speak. I did refer to the permanent clerk last night and that was the advice I got, not his advice as to what to do, but his advice as to the timing and so on.

Mr. Mitchell's motion, now three-pronged, wishes to bring us back prior to the House reconvening.

Mr. Laughren: Mr. Chairman, just one word of advice: There will be no other time when all the members of the committee will be together between now and when the House comes back. You might want to get a sense of what our schedules are now. It is going to become much more difficult to do so once we leave here today.

Mr. Chairman: Yes. There are several who are in England with the procedural affairs committee for two weeks and maybe more than that. Then there are several on the Ombudsman's committee in February.

Mr. Mitchell: I suggest to you that is why the first week in March, some time after March 2, would be a more appropriate time.

Mr. Elston: I may be on tour in the riding of Huron-Bruce during that time.

Mr. Renwick: Could I ask specifically what commitments people have in the week commencing February 22? It would be the last week of February.

Mr. MacQuarrie: I think that is when the Ombudsman's committee sits.

Mr. Mitchell: It is one of the weeks of February. I don't--

Mr. Renwick: I don't think that is the Ombudsman's week.

Mr. Mitchell: It has been left to your discretion within the wording of my motion, and I have suggested--

Mr. Renwick: The first week in March would be agreeable to me, assuming the House is not called back.

Mr. Mitchell: And if the House is called back, we will just have to live with that. So would you call my motion, please?

Mr. Chairman: So the consensus is early March, just before the House opens.

Mr. Renwick: Why don't we move that we adjourn until March 2 to reconvene at 10 o'clock that morning, subject to the chair cancelling it if it doesn't work out?

Mr. Chairman: That's fine.

Interjections.

Mr. Renwick: March 2 at 10 o'clock.

Mr. Chairman: That is Tuesday. Sorry. That will not be available.

Mr. Mitchell: How about Wednesday, March 3? Let me leave it open. Let me say, "To be reconvened during the week of March whatever it is, unless cancelled for whatever reason by the chair."

Mr. Renwick: I would just say, "We will reconvene at the call of the chair during the first week in March," and you specify the time.

Mr. Chairman: Fine. Remember, we are retracting the vote on section 20 in its entirety as amended. All those in favour of Mr. Mitchell's motion and the other prongs to it, raise their hands. Please let the record show that is unanimous.

We are left at the point in section 20.

Mr. Renwick: Could I ask Mr. Piché to repeat his remark about the bar so I can be upset?

Mr. Piché: It will newspaper publishers the next time; then I can get excited.

The committee adjourned at 12:15 p.m.

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